90-543

Supreme Court, U.S.
FILED
SEP 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

JOSEPH R. GIANNINI,
an individual,

Petitioner,

v.

HONORABLE MANUEL L. REAL, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Can the State Bar of California, which has a well known history of unlawful lobbying and self-serving political influence, constitutionally administer a patently arbitrary and inherently biased bar examination to deter and prevent out-of-state attorneys from gaining admission in California?

2. Can the local rules of the respondent United States District Courts constitutionally deny general admission to all out-of-state attorneys not licensed in California, and constitutionally disqualify from pro hac vice admission all out-of-state licensed attorneys who reside or work within California?

LIST OF PARTIES

HONORABLE MANUEL L. REAL, THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ALBERT LEE STEPHENS, JESSE W. CURTIS, FRANCIS C. WHELAN, IRVING HILL, A. ANDREW HAUK, WILLIAM P. GREY, DAVID W. WILLIAMS, ROBERT J. KELEHER, LAWRENCE T. LYDICK, LAUGHLIN E. WATERS, WILLIAMS M. BRYNE, ROBERT M. TAKASUGI, MARIANA R. PFAELZER, TERRY J. HATTER, JR., A WALLACE TASHIMA, DAVID V. KENYON, CONSUELO B. MARSHALL, RICHARD A GADBOIS, JR., EDWARD RAFEEDIE, PAMELA A. RYMER, HARRY L. HUPP, ALICEMARIE H. STOTLER, WILLIAM J. REA, JAMES M. IDEMAN, WILLIAM D. KELLER, FERDINAND F. FERNANDEZ, STEPHEN V. WILSON, J. SPENCER LETTS, DICKRAN TEVRIZIAN, JOHN G. DAVIES, RONALD S. W. LEW, THE CALIFORNIA SUPREME COURT, MALCOLM LUCAS, STANLEY MOSK, ALLEN BROUSSARD, EDWARD PANELLI, JOHN ARGUELLES, DAVID EAGLESON, MARCUS KAUFMAN, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, GORDON THOMPSON JR., WILLIAM ENRIGHT, EARL GILLIAM, HOWARD TURENTINE, RUDI BREWSTER, JOHN RHODES, THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA, LAWRENCE KARLTON, MILTON SCHWARTZ, EDWARD DEAN PRICE, PAUL RAMIREZ, ROBERT COYLE, EDWARD GARCIA, THOMAS MacBRIDE, PHILLIP WILKINS, M.D. CROCKER, THE COMMITTEE OF BAR EXAMINERS,

LIST OF PARTIES – Continued

JEANNE RAY, EDWARD COSTELLO, FERNANDO D. De NECOCHEA, GALAL S. GOUGH, JUDY JOHNSON, FULTON HAIGHT, FERN LAETHEM, JOHN R. STOKES, MICHAEL R. YAMAKI AND HOYT ZIA AS RESPONDENTS.

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The decision of the United States Court of Appeals for the Ninth Circuit is reported at ___ F.2d ___ (1990) and reproduced at Appendix (hereinafter App.) 1-16. Page references are to the reproduced opinions in the Appendix. The decision of the United States District Court for the Central District of California is reported at 711 F. Supp. 997 (C.D. Cal. 1989), and reproduced at App. 17-35. The unpublished one sentence order of the California Supreme Court is reproduced at App. 36. The unpublished opinion of the United States District Court for the Central District in *Giannini v. Real*, C 88-012467 is reproduced at 37-41. The Ninth Circuit decision in *Giannini v. The California Committee of Bar Examiners*, is published at 847 F.2d 1434 (1988) and is reproduced at App. 42-44.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was filed on August 16, 1990. Rehearing was not sought. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND RULES AT ISSUE

The constitutional provisions, Federal statutes, and local District Court admission rules involved are reproduced at App. 46-54. The California statutes and rules are reproduced at App. 54-59.

STATEMENT OF THE CASE

A. CONSTITUTIONAL CHALLENGES PRESENTED

California has the most fundamentally arbitrary, capricious, and patently dishonest out-of-state attorney

licensing scheme in the history of the legal profession. Petitioner, a licensed attorney, challenges the constitutionality of California's out-of-state attorney bar examination and grading process under causes of action for privileges and immunities, due process, equal protection, commerce clause, right to travel, and 42 U.S.C. §§ 1983, 1985. Petitioner alleges he has been deprived under color of state law of the privilege to practice law in California and other rights secured by the Constitution. Petitioner is ineligible for pro hac vice admission in the state courts because he is presently a resident and works in California. See *California Rule of Court*, 983 App. 58-59.

Petitioner also challenges the local admission rules of the United States District Courts for the Central, Southern, and Eastern Districts of California. The Northern District of California's local rules generally admit all out-of-state licensed attorneys, and these rules are not challenged. App. 53. Central District local Rule 2.2.1 denies general admission to all non-California licensed attorneys. Central District local Rule 2.2.3 disqualifies from pro hac vice admission all out-of-state licensed attorneys who reside, are regularly employed, or engage in business, professional, or other similar activities in California. App. 51-53. The admission rules for the Eastern and Southern District are virtually identical to the Central District's admission rules and are also based on California's arbitrary and capricious licensing scheme.

Petitioner has previously applied for and been denied District Court pro hac vice admission. Petitioner alleges the challenged local Federal District Court out-of-state attorney admission rules are per se not "rational and necessary." Petitioner further alleges the State Bar's exam given to out-of-state attorneys is unconstitutional. As such, it is equally unconstitutional in the respondent District Courts.

B. GENERAL OVERVIEW

The evidence in this case documents malpractice by the State Bar of California in licensing out-of-state attorneys, and perjury and obstruction of justice by State Bar counsel. The California federal courts are required to provide a neutral forum, but they have refused to acknowledge the evidence of record. This evidence implicates the integrity of the federal system because the Federal District Courts admission policies are entirely based upon the State Bar's out-of-state attorney licensing scheme. Moreover, the federal courts in California have wholly refused to allow Petitioner discovery and cross-examination – procedures which he is entitled to receive by law.

The Ninth Circuit's decision also ignores this Court's recent line of out-of-state attorney admission cases starting with *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). This Court has held an attorney's "opportunity to practice law" is a "fundamental right" protected by the "Privileges and Immunities Clause". Id., at 283.

The Court's decision in *Piper* establishes a change in doctrine because the lawyer's license to practice law was elevated to a constitutionally protected interest. Thus, the Court in *Piper* applied a strict scrutiny standard of review. The Court's holding in *Piper* that lawyers have a federally protected right substantially eviscerates the underpinnings of prior case law concerning out-of-state attorney admissions. See *Sestric v. Clark*, 765 F.2d 655, 658 (7th Cir. 1985) ("Piper, . . . requires us to take a fresh look at the issue, and not just rest on dicta in lower court decisions, our own [circuit opinions] or others"). Here, the Ninth Circuit did not take a fresh look at the issues and ignored the evidence of malpractice and capricious conduct. The Privileges and Immunities Clause does not

preclude a disparity in treatment where substantial reasons exist for the discrimination and the degree of discrimination bears a close relation to such reasons.

Following *Piper,* in *Frazier v. Heebe,* 107 S.Ct. 2607 (1987), this Court invalidated a Louisiana U.S. District Court local admission rule that required a Louisiana licensed attorney to have either an office or residence within the state. The Court in *Frazier* employed its supervisory power and applied a "principles of right and justice"/"rational and necessary" standard of review. Id., at 2611 n.4. The *Frazier* Court also recognized in n.7 that rules which discriminate against non-resident attorneys are difficult to justify in the context of federal court practice, there is a growing body of specialized Federal law, a mobile federal bar, and an increased demand for specialized legal services regardless of state boundaries. The *Frazier* court, following *Piper,* further stated pro hac vice status is an alternative that does not allow non-resident attorneys to practice on the same terms as a resident member of the bar. Id., at 2614.

In *Supreme Court of Virginia v. Friedman,* 108 S.Ct. 2260 (1988), this Court held an out-of-state licensed attorney had a substantial stake in practicing law and the state had burdened that right by denying the attorney the benefit of a discretionary admission on motion provision. The Court held the Privileges and Immunities standard of review was applicable over vigorous objection by the State, and noted that lawyers who are admitted in other states and seek admission on motion are not less likely to respect the bar. Id., at 2266. The Court further squarely rejected the State's argument "[S]o long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination" (cites omitted) "the State cannot be said to have discriminated against

non-residents as a 'matter of fundamental concern.' " Id., at 2264.

Clearly, if a State's discretionary admission on motion provision per *Friedman*, is subject to review under a Privileges and Immunities analysis, a State's bar exam that is alleged to be arbitrary and inherently biased against out-of-state licensed attorneys would also be subject to the same standard of review. See *Piper* (supra) 470 U.S. at 285 n.18). ("Many of the states that have erected fences against out-of-state attorneys have done so primarily to protect their own lawyers from professional competition (cites omitted). This reason is not 'substantial'. The Privileges and Immunities clause was designed primarily to prevent such economic protectionism").

In *Barnard v. Thornstenn*, 109 S.Ct. 1294 (1989), the Court again struck a restriction on out-of-state attorneys. In *Barnard*, the Court refused to exercise its supervisory power because the nature of the challenged residency requirements implicated interests beyond the federal system. The Court, thus applied the Privileges and Immunities-substantial state interest, closely related, less restrictive alternative test. The Court also rejected the Virgin Islands argument that the challenged residency requirements were necessary because of geographical isolation and inadequate resources to supervise the ethics of a nationwide bar membership. Id., at 1301. The dissent noted durational residency requirements are invalid under prior cases dealing with the "right" of interstate travel. Id., at 1303.

Federal jurisdiction for a general Privileges and Immunities claim is provided by 28 U.S.C. § 1331. App. 47. Federal jurisdiction for an individual Privileges and Immunities claim is statutorily authorized by 28 U.S.C. § 1343(a)(3). App. 48. Congress has also authorized a civil action for the deprivation of rights under color of state

law including Privileges and Immunities under 42 U.S.C. §§ 1983, 1985. App. 49.

Central District Judge A. Wallace Tashima, through privately retained counsel, has argued to the Ninth Circuit, that recent U.S. Supreme Court cases indicate an increased willingness on the part of the Court to scrutinize bar admission standards, both state and federal, to ensure that they are narrowly drawn. Respondent Judge Tashima has argued the rational basis standard of review is no longer applicable for admission challenges brought by a licensed attorney.

Judge Tashima has submitted to the Ninth Circuit Court, that because of uniformity of federal substantive and procedural law throughout the country, the requirement of California Bar admission for out-of-state attorneys is overbroad and not narrowly tailored. Judge Tashima has argued there is no basis to conclude attorneys licensed in California are presumptively more qualified than attorneys not licensed in California. Judge Tashima further recognizes the California bar examination does not test familiarity with California law except as to the narrow subject areas of community property and trusts and estates – two subjects rarely at issue in federal actions. In Judge Tashima's opinion the existing challenged local Federal rules should be invalidated because the rules do not meet *Frazier's* requirements that the rules be both "necessary and rational." Judge Tashima has not expressed an opinion on the State Bar's licensing policies, and Judge Tashima has moved for a protective order from responding to interrogatories and deposition testimony.

Certiorari is requested because the Ninth Circuit Court's decision herein ignores because of locality bias both the substantive evidence of State Bar misconduct, and the law in *Piper* and its progeny.

C. PETITIONER'S LEGAL QUALIFICATIONS AND CALIFORNIA BAR EXAM EXPERIENCE

Petitioner is an American citizen and a 1983 graduate of the A.B.A. accredited Temple University School of Law, Philadelphia, Pennsylvania. Petitioner passed the Pennsylvania and New Jersey bar on his first attempt and scored in the top 15 percent on the objective national Multi-State Bar Examination. Petitioner was licensed as an attorney under comprehensive and rigorous licensing standards. Lawyers licensed by the Keystone and Garden States have a well known reputation for competence throughout the country. Petitioner is a dues-paying active member in good standing of the Bar of these State Courts.

Prior to law school, Petitioner was honorably discharged from the U.S. Army and was employed for five years in Philadelphia, Pennsylvania by the United States Department of the Treasury as an I.R.S. agent. Petitioner was licensed as a C.P.A. by the State of Pennsylvania. As a Federal agent, Petitioner has had extensive training and experience in all aspects of Federal taxation, civil and criminal investigation, Federal jurisdiction and procedure, and legal research. Petitioner was officed in the Federal Building and United States Court House. This building also houses the Eastern District Court of Pennsylvania and the United States Court of Appeals for the Third Circuit. The ambience permeating this Federal institution, located one block from historic Independence Hall, reflects a high degree of professional competence, notions of fundamental fairness, and the principles this country was formed upon.

As an attorney, Petitioner has specialized in Federal law and litigation. See *Bernicker v. Pratt and Drexel Burnham Lambert*, 595 F. Supp. 1034 (E.D. Pa. 1984), a Rule 10 b-5 tax straddle controversy wherein Petitioner was plaintiff's attorney of record in a decision by Chief Judge

Joseph S. Lord, III. Petitioner is also admitted to practice in the Northern District of California, United States Court of Appeals for the Ninth Circuit, United States Tax Court, Eastern District of Pennsylvania, and the U.S. District Court for New Jersey.

Petitioner in 1985 was personally solicited and offered a partnership opportunity by a California attorney. This California attorney had first hand knowledge of Petitioner's professional training and legal experience. Pursuant to this offer, Petitioner sold his home in New Jersey, purchased a replacement home in California, and began working in a California law office in January 1986. Petitioner twice prepared for and failed the California "attorney bar" exam. Petitioner initially believed his failure to pass was his fault. As such, Petitioner attended a California Bar Review course costing $1,000. Petitioner attended every lecture and diligently prepared for the July 1986 and February 1987 exams. Petitioner at that time did not have four years experience as an attorney and was required to take the objective Multi-State exam. Petitioner easily passed both the July 1986 and February 1987 Multi-State exams. On the February 1987 objective Multi-State exam Petitioner scored 68 points in excess of the score the State Bar deems passing. Nevertheless, Petitioner was denied admission on the exclusive basis of having allegedly failed subjective entry level questions. In several of Petitioner's answers, the only way the grader could not have known the answer was written by a knowledgeable and competent attorney was not to have read the answer. Petitioner's average for the February 1987 eight subjective questions was 60. Passing is 72.

As a result of his California bar exam experience, and because of the horror stories other out-of-state attorneys have communicated, Petitioner is well aware that the

subjective test grading is patently arbitrary and inherently biased against out-of-state attorneys. The statistical evidence also corroborates this conclusion. Petitioner as an officer of the court, has an ethical obligation to promote access to the law, and he vigorously objects to the arbitrary, capricious, and tyrannical licensing policies adopted by the State Bar of California against sister state attorneys.

D. THE CALIFORNIA STATE BAR, AND THE ENVIRONMENT IN WHICH IT FUNCTIONS; THE CALIFORNIA BAR EXAM, AND REASONS WHY THE CALIFORNIA ATTORNEY EXAM IS UNCONSTITUTIONAL

Last term, this Court in *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), in a unanimous opinion struck down as unlawful the custom and habit of State Bar political activity and self-serving lobbying. The California Committee of Bar Examiners, the named Respondents in this suit, are a section within the State Bar. The individual Committee members are composed of politically appointed, non-compensated attorneys in private practice. The political activity and lobbying held invalid by this Court has enabled the State Bar of California to protect its own economic interest by erecting a fence against out-of-state attorney competition. This Court may recall in *Keller v. State Bar of California*, 47 Cal. 3d 1152 (1989), the California Supreme Court found:

> "The legislature is well aware of the Bar's activities and the Bar's authority for those activities is derived from Cal. Bus. & Prof. Section 6031." *Keller*, 47 Cal. 3d at 1170.
>
> The California Supreme Court then ruled:
>
> "Accordingly we conclude, the Bar may use dues to finance all activities germane to its statutory purpose, a phrase which we construe broadly to permit the Bar to comment generally

upon proposed legislation or pending litigation. *Keller,* 47 Cal. 3d at 1157.

The overall effect of this unlawful political activity was that the Bar lobbied the legislature, the legislature passed the law and the legislature will not pass any law that the Bar finds inimical to its interest. Each hand washes the other. Out-of-state attorneys are persona non grata to the Bar and without recourse to the state legislature.

It may be further noted: (a) the State Bar is supervised by the Business and Professions Committee, and former Chairman Sen. Joseph Montoya of this Committee was recently convicted of several counts of extortion, and selling his office. Los Angeles Times 2/3/90 A.27; and (b) the Business and Professions Committee is viewed as a "juice" committee because of the huge amount of campaign contributions given to its members by doctors and other professional groups affected by the Committee's actions. id. and (c) several members of the California Acupuncturist Licensing Board were recently arrested and convicted of rigging the licensing exam and selling exam answers. Los Angeles Times 2/1/90 B.3.

As demonstrated by *Keller* (supra) the California Supreme Court allows the Bar free reign. It is well known throughout the State, that the California Supreme Court is heavily backlogged with approximately 400 cases to be heard and decided. This backlog stems from the fact that the Court has over 180 pending death penalty cases which are reviewed directly from the trial court. These death penalties cases are appealed faster than the Court can dispose of them. The Court has cases in inventory over three years old. A recent survey by the Los Angeles Daily Journal (legal newspaper) reports the average time between granting review in California and the Court's entry of an opinion is twenty-one months. Because of the backlog, the Court rarely grants a writ of review in civil

cases. The California Supreme Court has also suffered as a result of three justices being voted out of office in 1987, and the three replacement justices having resigned shortly after investiture, allegedly as a result of overwork. Dean Gerald F. Uelman, of Santa Clara Law School has been quoted, "Perhaps the greatest failing of the Lucas Court will be its unwillingness to admit there's a serious problem, and to put serious, institutional reform at the top of its agenda." Los Angeles Times May 26, 1990 p. A.37.

Thus, the overworked California Supreme Court has fully delegated the responsibility to the State Bar for determining whether out-of-state attorneys are qualified. The State Bar administers the exam and certifies applicants meeting its requirements to the Supreme Court for admission. The Bar determines the testing requirements for out-of-state attorneys, and which attorneys are admitted. *Cal. Bus. & Prof. Code* §§ 6060.5, 6062. In actual practice, the Supreme Court rubber stamps all State Bar recommendations as to which applicants have passed the exam. There has never been a reported case in California including the instant case, wherein the Supreme Court has reviewed the admission policies and testing procedures employed to qualify out-of-state attorneys for admission.

Left to its own devices, the State Bar requires all sister-state attorneys who seek California admission to take and pass a shallow entry level general bar examination. The out-of-state attorney's education, experience, specialty, or primary place of employment are given no consideration. Sister-state attorneys take the same exam as everyone else, except that attorneys with more than four years experience do not have to take the only valid and accurate test of the exam, the Multi-State. This gratuity provides little in the way of a benefit because the

subjective test results are arbitrary and inherently biased against out-of-state attorneys, and the Multi-State subjects are again tested in the subjective sections. Ninety-five percent of the California bar exam tests general principles of law. Only two subjects concern California law, community property and estates and succession. These narrow state law subjects are not always tested, nor are they relevant to federal practice.

In effect, the out-of-state attorney with more than four years experience takes a completely subjective bar examination. The exam consists of six one hour essay questions, and two, three hour performance tests. The performance tests consist of a file, containing exhibits, cases, and statutes. The attorney is requested to review the materials, use his or her general legal knowledge and life experience, and write his or her "opinion" as to how to accomplish the stated objective. These shallow performance tests require the attorney to demonstrate how he or she would interview a client, or negotiate a transaction, or outline a course of action for the resolution of a legal problem. The purported purpose of the test is to determine whether the applicant or attorney has practical lawyering skills sufficient to practice law in California.

The State Bar's exam per se deters attorneys from seeking California admissions. The exam is only given twice a year. The results are not available until four months later. The requirement of complete re-testing to most out-of-state attorneys is a "prohibitive burden." There is also little difference between waiting ten months for bar exam results and a durational residency requirement. Furthermore, the exam as applied interferes with the out-of-state attorneys' "fundamental right" and "opportunity to practice law" in California. *Piper* (supra), 470 U.S. at 283.

The Ninth Circuit Court's opinion does not mention this Court's holding that attorneys licensed by a State Supreme Court have a constitutionally protected "Privilege and Immunity" to practice law. The Ninth Circuit Court's opinion also does not acknowledge that "out-of-state attorneys may be the only means available to vindicate federal rights" and "champion unpopular causes". Id., at 281.

Petitioner in this case has asserted the State Bar does not have a legitimate "substantial state interest" in complete re-testing of all out-of-state attorneys. Petitioner has argued the exam given to out-of-state attorneys is not "closely related". Petitioner has also submitted there are "less restrictive aiternatives short of complete re-testing to ensure the quality of attorneys in the state.

The Ninth Circuit did not address Petitioner's argument that there is no "substantial reason" to examine a correspondence law school graduate in the same manner as an out-of-state attorney, and there is no "substantial reason" why attorneys should be treated any differently than C.P.A.'s in California. California is one of the few remaining states in the nation that permits non A.B.A. accredited graduates to become licensed as an attorney. Thus, almost all out-of-state attorneys are A.B.A. accredited graduates, while generally twenty-five to forty percent of the California bar applicants are not A.B.A. accredited graduates. Additionally, many California professional licensing boards examine the original licensing standards imposed by the sister-state, and waiver of complete re-testing is permitted. C.P.A.'s are admitted by reciprocal licensure without knowing the first thing about California State income taxes. See *Cal. Bus. & Prof. Code* § 5087. App. 54-55.

The Ninth Circuit Court also did not determine whether the test given to out-of-state attorneys is "closely

related" to a legitimate state interest. California Supreme Court case law holds "the purpose of the bar exam is to measure whether the degree of legal learning the applicant has attained is sufficient to permit the applicant to practice law." *In Re Admission to Practice Law*, 1 Cal.2d 61, 64 (1934). The Circuit Court's conclusion, "California has the right to make its examination more comprehensive and difficult than other states," (App. 8) misses the mark since it fails to recognize the distinction between a licensed attorney who has a "Privilege and Immunity" and a law student who does not. This Ninth Circuit conclusion is also in direct conflict with the "Privileges and Immunities" case law. The "Privileges and Immunities Clause" establishes a norm of comity." *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). Petitioner has not received comity in California. The purpose of the Privileges and Immunities clause is to allow citizens of State A to do business in State B under terms of substantial equality. *Toomer v. Witsell*, 334 U.S. 385 (1948). Petitioner has moved from the State of New Jersey to California and has not been able to do business in California as a lawyer in terms of substantial equality. The Privileges and Immunities clause imposes a direct restraint on State action in the interest of interstate harmony. The Ninth Circuit did not recognize the out-of-state attorney has a federally protected "immunity."

Additionally, the Circuit Court's conclusion "California has the right to make its examination more comprehensive and difficult than other states" (App. 8) does not square with the evidence. The evidence documents the test per se and the results thereof are not "closely related." Complete re-testing does not take into account the trend in the law to specialization, interstate mobility, and uniformity of law and procedure. Rand Corporation

reports establish exam after exam that the California performance tests are less than 48% reliable because of substantial differences in reader opinion as to the quality of an answer. If a second grader read the exam answer and scored it the same as the first reader, the test results would be 100% reliable. The performance test in which the out-of-state attorneys "opinion" i.e. "performance" and practical lawyering ability is evaluated is less reliable than flipping a coin. Test results less than 50% reliable are by definition patently arbitrary. The performance test results have no "rational relation" to an attorney's capacity to practice law. The test is nothing more than a popularity contest, and out-of-state attorneys receive the same level of thoughtful regard as a non-A.B.A. accredited law school graduate.

The subjective essay and performance tests combined are approximately 62% reliable. The reliability indexes are based on a study of approximately twenty percent of the examination answers that total between plus or minus two percentage points of passing after the initial reading. Thus, eighty percent of the applicants have their subjective scores read only once. And, on a second reading scores have differed by as much as 35 points on a one hour essay and up to 105 points on a three hour performance tests.

Controlled experimental studies prepared by the Rand Corporation also establish that when a California bar exam grader re-grades a set of answers within a few days of the first reading (without knowledge of the grades initially assigned) the graders agreed with themselves only 75% of the time as to whether the answer is passing, and the readers agreed with each other only 67% of the time as to whether or not the answer is a pass or fail.

The Rand Corporation reports further establish that, during the four times Petitioner sat for the California bar exam, the subjective test answers were consistently underscored, preventing between 7% and 21% of qualified applicants, including attorneys, from gaining admission. This underscoring was perpetrated despite a 1984 State Bar report which stated that it was malpractice to underscore the subjective tests.

Attorneys are further penalized in the actual grading of the examination. The exam is calibrated to pre-selected law students answers depending on the law school attended and repeater status. Attorney answers are not included in the pre-selected sample. Thus, law school answers are the standard that is used to score attorney examination answers. Attorneys are not given credit for specialized knowledge and experience demonstrated in their answer because the exam is calibrated to law student answers.

Out-of-state attorneys are also unfairly evaluated because the examination answers are lumped together and graded in an assembly-line manner by attorneys in private practice. Each of the over one hundred graders read approximately six hundred answers to the same question. The only qualification for a grader is that the attorney has passed the exam on the first attempt at least one year earlier. These moonlighting attorneys grade the exam in their spare time at their home or office and are paid $2.00 per essay answer and $2.50 per performance test. The pay scale alone implies the graders spend between sixty seconds and two minutes with an attorney's answer. The out-of-state attorney is graded by his competitor with scant attention to reasonable differences of opinion. The State Bar's grading process is inherently biased against out-of-state attorneys.

The uncontroverted evidence further establishes that for seven consecutive years between 1980 and 1987, the July bar examination pass percentage for first time A.B.A. accredited law school graduates was 67.4%, while the pass percentage for attorneys with four years experience was 37%. As to attorneys with less than four years experience, the pass percentage decreases with the number of years of experience. The pass percentage of non A.B.A. accredited graduates is consistent with the pass percentage for attorneys with more than four years experience. The suggestion that experienced attorneys may have lost some level of academic test-taking skill is unavailing because the attorney is required to perform practical lawyering on the exam.

Clearly, requiring an out-of-state attorney to pass a shallow entry level subjective test that is substantially unreliable, graded in an assembly line, and underscored, establishes that the out-of-state attorney exam is "naked protectionism", not "closely related," and not "rationally related" to the attorneys capacity to practice law.

Petitioner further argues there are "less restrictive alternatives" available to the Bar for assuring competence. Twenty-five sister-states admit out-of-state attorneys on motion. Approximately another dozen states give out-of-state attorneys a limited bar examination on state law and procedure.

The out-of-state attorney has no bona fide right of appeal or procedural due process rights in California. The attorney's examination answer has nothing written on it other than a grade. This grade is not even affixed by the grader. There is no known evidence that establishes the answer was read. The Ninth Circuit's conclusion Petitioner "was able to see why he failed" (App. 5) is an artifice. Petitioner has no clue as to why he received the

subjective grades, other than bias, deliberate indifference, State Bar stupidity, and economic protectionism.

The alleged right to petition the California Supreme Court for review is also a facade. This facade shores up a fundamentally bankrupt bar exam. The Court never grants review of competence issues and has 400 pending cases. The failed out-of-state attorney who has as a federally protected "Privilege and Immunity" has less due process rights than a convict in California.

As an American citizen Petitioner has a constitutional right to interstate travel and freedom of speech and advocacy. See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1968). ("In moving from state to state . . . appellee was exercising a constitutional right and any classification which serves to penalize exercise of that right, unless shown to be necessary to promote a compelling government interests is unconstitutional"). The respondents' challenged licensing policies clearly penalize out-of-state attorneys' right to travel. Moreover, requiring out-of-state attorneys to perform for their competitor is an unlawful prior restraint on freedom of speech and advocacy.

E. PROCEDURAL HISTORY

The California federal courts have extended carte blanche in this case to the home town Respondents. Petitioner first filed *Giannini v. Committee of Bar Examiners* in the United States District Court after receiving his February 1987 bar exam results. A twenty-two page complaint alleged all of the evidence and causes of action referred to in this petition for writ of certiorari. Documentary evidence was submitted verifying the complaint allegations. Petitioner alleged several times that the California Supreme Court does not provide hearings, that the State Court was an inadequate forum to resolve these

issues of federal law, and that exhaustion of administrative remedies was not necessary for a 42 U.S.C. § 1983 claim. Petitioner did not file for administrative review with the California Supreme Court because it is well known in the California legal community that to do so is a waste of time. The District Court denied Petitioner the right to all discovery and dismissed the complaint.

Petitioner filed an appeal to the Ninth Circuit Court. After oral argument, Petitioner filed a similar complaint in March 1988 against the Central District Court to ensure a federal claim as it was apparent the Ninth Circuit panel desired to avoid the evidence and issues.

The Ninth Circuit first held the District Judge was incorrect as there was subject matter jurisdiction. However, the appellate court held Petitioner failed to state a federal claim. The Ninth Circuit one page per curiam opinion was absurdly inadequate. The Court stated the facts incorrectly. The Court did not indicate whether the complaint was dismissed with or without prejudice. The Court did not address the U.S. Supreme Court's decision in *Piper*. The Court did not address the fact, which Petitioner repeatedly argued in his brief, that the State Bar's admission policies also implicated the District Court admission rules.

Petitioner timely filed a petition for rehearing en banc. Approximately ten days later, a different Ninth Circuit panel entered a conflicting opinion on a related appeal filed by a New York attorney against the Committee of Bar Examiners in *Margulis v. California Committee of Bar Examiners*, 845 F.2d 215 (9th Cir. 1988).

The Ninth Circuit *Margulis* panel was unaware of the prior panel's decision in *Giannini, supra*, and Petitioner's pending Petition for Rehearing. Petitioner uncovered the *Margulis* opinion by reading the Los Angeles Daily Journal. Petitioner informed the Ninth Circuit of the split in

decisions and the reasons for the split. The reason for the split, was State Bar counsel, intentionally perjured themselves and obstructed justice by failing to inform the Ninth Circuit that there were related cases pending. State Bar counsel intentionally in its appellee brief filed December 22, 1987 certified under oath that there were no related cases pending, when in fact there was a related case pending. See App. 45 for copy of proof of State Bar perjury and obstruction of justice. The *Margulis* case was argued and submitted two weeks earlier on December 9, 1987 by the same State Bar attorneys, chief counsel Diane Yu and first assistant Truitt Richey.

Diane Yu was also immediate past chairperson of the California Committee of Bar examiners when the pass percentage had reached a record low. This perjury by State Bar counsel is a felony under federal law, evidence of malpractice, and deliberate indifference to the rule of law. Quite frankly, if the leaders of the State Bar are willing to lie under oath to a Federal court, one can easily imagine the license moonlighting attorneys take in grading out-of-state attorneys.

Petitioner requested sanctions by the Ninth Circuit Court against counsel for lying under oath. Mr. Margulis did not have the benefit of Petitioner's evidence and arguments of law to substantiate his legal theories. Petitioner also did not have the *Margulis'* decision for argument in his earlier filed petition for rehearing en banc.

The Ninth Circuit ignored the request for sanctions because to acknowledge this State Bar felonious conduct would be tantamount to establishing the merit of petitioner's argument. The Court without further hearing revoked the first opinion in the Petitioner's appeal, and issued a new per curiam opinion consistent with the *Margulis* opinion holding that there could be no Federal depravation until Petitioner first filed a petition with the

California Supreme Court. Rehearing en banc was denied. See App. 42-44.

Pursuant to the second Ninth Circuit opinion, Petitioner filed a Petition for Admission and Other Declaratory Relief with the California Supreme Court. Petitioner also filed an ethics complaint against Yu and Richey with the California State Bar. A Staff attorney under Yu investigated and concluded Yu and Richey's intentional misstatement under oath did not violate State Bar rules.

While the petition was pending in the California Supreme Court, Petitioner moved for summary judgment in the District Court filing of *Giannini v. Real,* requesting the Court to declare the Central District's general and pro hac vice admission rules unconstitutional. App. 37-41. The State Bar of California retained two different law firms to file separate amicus briefs urging the District Court to uphold the constitutionality of the local District Court admission rules. The evidence of State Bar malpractice and perjury was submitted in Petitioner's Motion for Summary Judgment. Petitioner was again denied all discovery and cross-examination. The District Judge in *Giannini v. Real* ordered the Federal claim stayed until the California court decided the administrative appeal. App. 37-41.

The California Supreme Court ignored the issues as expected. The Court held in a one sentence decision "Petition for writ of review is denied." App. 36. California Chief Judge Malcolm Lucas, prior to appointment, was also a Central District Judge for 14 years.

Petitioner then consolidated the state and Federal claims in one action and amended *Giannini v. Real,* to include the California Supreme Court, the Committee of Bar Examiners, and the Eastern and Southern Districts of California.

San Francisco Senior District Judge Stanley A. Weigel volunteered to take the case. Two hearings were conducted in San Francisco due to Judge Weigel's age of 84 and unwillingness to travel. At the first hearing on January 3, 1989 Judge Weigel indicated his intention to decide the entire controversy on March 20, 1989 in an afternoon hearing in San Francisco. Counsel for the Committee indicated that he was not representing the individually named Committee members, only the Committee as an entity. Judge Weigel denied petitioner for the third time the right to all discovery.

The District Judge granted the California Supreme Court a protective order from responding to forty-five admissions. These admissions included the following:

> *Request No. 12:* The California Supreme Court is against all attorney reciprocity.
>
> *Request No. 23:* The California Supreme Court has authorized the Committee of Bar Examiners on the July 1986 exam to utilize performance tests the results of which are 47% reliable to evaluate all attorneys seeking admission in California.
>
> *Request No. 38:* The California Supreme Court has authorized Truitt Richey and Diane Yu in their appellee brief filed December 22, 1987 to falsely certify "nor are there any related cases pending in this court."

The District Judge also granted the respondent Federal District Judges including Judge Tashima a protective order from responding to twenty-five interrogatories such as:

> 8. State all dates the judges of the Eastern District have specifically reviewed the State of California's policies and procedures for testing licensed sister-state attorneys seeking admission in California.
>
> 11. Thirty-one states admit sister-state attorneys on motion with varying lengths of

experience, what are the reasons the Eastern District does not have a similar admission on motion provision?

20. Assume California requires all sister-state attorneys to pass a performance test the results of which are less than 48% reliable. Assuming this to be true, why would the federal courts' reliance on this examination not offend "principles of right and justice"?

The reason protective orders were sought and Petitioner was denied all discovery and cross-examination is obvious. The respondent state and federal judges have never reviewed the State Bar's licensing policies. State Bar counsel was not authorized to act unlawfully by committing perjury. Test results less than fifty percent reliable are not rational and are prima facie invalid. There is no valid reason other than economic protection not to have an admission on motion provision. Petitioner has been consistently denied the opportunity for discovery and cross-examination to establish in open court the validity of his arguments because he is arguing an unpopular cause against the home team.

Petitioner moved for summary judgment against all defendants. Petitioner again requested sanctions against State Bar counsel for perjury. At no time in this entire proceeding did any governmental attorney even address the indisputable fact State Bar counsel lied under oath to the Ninth Circuit. Petitioner also submitted a Motion for Entry of Default Judgment. Petitioner personally served the Committee as an entity and provided mail follow-up to the individuals. The individual members were twice mailed Notices of Acknowledgment of Summons and Complaint and refused to acknowledge service of process. Petitioner alleged service of process, on the individual Committee members, had been properly completed by service on "an agent authorized by appointment or by

law to receive service of process." Petitioner also personally served a committee member at his local office. No committee member answered the complaint or entered an appearance.

On March 20, 1989 a two hour hearing was conducted in San Francisco. Similar to prior hearings, there was no testimony or cross-examination. District Judge Weigel indicated his extreme, local bias by requesting in open court on the record that Petitioner do him and the Bar a favor and just forget about the perjury and obstruction of justice. Judge Weigel also stated on the record, in view of the pleadings, it was obvious Petitioner was more qualified than "hundreds" of California attorneys.

The San Francisco District Judge filed an opinion on April 20, 1989 holding Petitioner's claims barred by the doctrine of res judicata. This conclusion was premised on the California Supreme Court having refused to issue a writ of review. Judge Weigel ruled Petitioner had not completed service on the individual members. The District Judge in his opinion also requested Petitioner to renotice the Motion for Sanctions in San Francisco as a pretextual ploy in order to "cover-up" the perjury and obstruction of justice by State Bar counsel. Judge Weigel had earlier made his intentions clear when he requested Petitioner to forget State Bar counsel's perjury and obstruction of justice.

Petitioner filed an appeal to the Ninth Circuit Court. Petitioner in the Notice of Appeal, among other items, specifically appealed the District Court's refusal to acknowledge, rule upon, and sanction State Bar counsel Truitt Richey and Diana Yu for perjury. Briefing was completed. The prior panel of Ninth Circuit Judges in *Giannini v. Committee of Bar Examiners* specifically refused reassignment of this locally unpopular appeal. These Ninth Circuit Judges had first hand knowledge of the

State Bar perjury and obstruction of justice. Petitioner again requested sanctions, the entry of a default judgment, and summary judgment against all defendants. Judge Tashima submitted his arguments noted earlier. See, Ante p. 6.

The Ninth Circuit opinion, disregards the evidence that the attorney exam is wholly arbitrary and capricious, fails to analyze the recent U.S. Supreme Court cases on attorney admission, and applies an incorrect standard of review. The Court sidestepped the issue of sanctions for perjury by holding the District Court did not abuse its discretion, notwithstanding the fact the District Judge never ruled on the sanctions issue because the entire controversy had been appealed. The Ninth Circuit's decision is the product of intense locality bias against out-of-state attorneys.

ARGUMENT

I. THE COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE DECISION BELOW RAISES IMPORTANT QUESTIONS REGARDING THE PRACTICE OF LAW BY OUT-OF-STATE ATTORNEYS, AND THE APPELLATE DECISION IS IN DIRECT CONFLICT WITH *PIPER* AND ITS PROGENY.

This court should grant certiorari for a number of significant and ineluctable reasons. First, this case concerns fundamental issues regarding the practice of law in California. These issues are at the core of the administration of justice process. Thirty million Americans reside in California. These American citizens possess federally protected rights in state and federal court, including the constitutional right to attorney representation. *Piper* and its progeny acknowledge a constitutional right to obtain out-of-state counsel to seek the vindication of federal rights and champion unpopular causes.

Second, as a result of *Keller v. California State Bar,* (supra), this Court is well aware the State Bar of California has a history of unlawful, self-serving, political lobbying. This Court is also aware California Courts have acquiesced in State Bar conduct which this Court has held to be unconstitutional.

Third, the Appellate decision below is in direct conflict with this Court's holding in *Supreme Court of New Hampshire v. Piper,* (supra) and its progeny. The Ninth Circuit in this case held "there is no fundamental right to practice law or to take the bar exam." App. 7, and "Here, the challenged rules do not involve the impairment of a fundamental right because there is no fundamental right to practice law." App. 12. This holding is in direct conflict with the holding in *Piper,* "The lawyer's role in the national economy is not the only reason the opportunity to practice law should be considered a 'fundamental right'." *Supreme Court of New Hampshire v. Piper,* (supra) 470 U.S. at 281. The Appellate Court's failure to apprehend that fundamental rights were implicated causes the entire opinion to be permeated with reversible error.

Fourth, even assuming arguendo, the Appellate Court reached the correct conclusion, the opinion is woefully inadequate. The opinion does not analyze in any way the Court's holding or teachings in *Supreme Court of New Hampshire v. Piper,* (supra). The opinion also does not mention the Court's decision in *Supreme Court of Virginia v. Friedman,* (supra) or *Barnard v. Thornstenn,* (supra). The Appellate Court has ignored this Court's application of the strict scrutiny standard of review in *Barnard* when both state and Federal interests are intertwined. Thus, the Appellate Court should have proffered justification for departing from the strict scrutiny standard of review applied in *Piper, Friedman,* and *Barnard.* The decision below did reference *Frazier v. Heebe,* (supra). However,

the Appellate decision transmutes the "rational and necessary" standard of review adopted in *Frazier* to a "rational basis" standard without explanation. App. 16. Clearly the challenged local Federal District Court rules are not "necessary" in view of the Northern District's admission rules.

Fifth, the Appellate Court's conclusion that an out-of-state licensed attorney cannot challenge the California Attorney bar examination under the Privileges and Immunities Clause because "discrimination on the basis of out-of-state residency is a necessary element for a claim under the privileges and immunities clause" (App. 6) is without legal foundation. The Appellate Court cites for this proposition a California District Court case entered prior to this Court's decision in *Piper* and its progeny. This authority was invalidated by *Piper*. Moreover, the argument that there can be no discrimination because all attorneys have to take the attorney bar examination has been rejected. *In Supreme Court of Virginia v. Friedman*, (supra), the State of Virginia vigorously argued without success: "So long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination, . . . the State cannot be said to have discriminated against non-residents as a matter of fundamental concern." *Friedman* (supra), 108 S.Ct. at 2264. The *Friedman* Court noted the issue is whether a State has burdened the practice of law to out-of-state attorneys who have a substantial stake in practicing law within the state. This discrimination on the basis of residency argument further ignores the admonition that comity is the norm under the Privileges and Immunities Clause. *Austin v. New Hampshire*, 420 U.S. 656 (1975), and disregards mandatory federal jurisdiction for a "Privileges and Immunities" claims under 28 U.S.C. § 1343 for causes of action for deprivations of "Privileges and

Immunities" under 42 U.S.C. §§ 1983, 1985. Residency has nothing – whatsoever – to do with an individual "Privileges and Immunities" claim under these Federal statutes.

Last but not least, this Court is respectfully requested to grant certiorari because Petitioner is a competent attorney who has been deprived of his livelihood and stigmatized as a result of the Bar's finding Petitioner is not qualified to practice law. The Bar's finding is erroneous and not supported by "rational" evidence. Petitioner has been wholly denied the opportunity to an open forum, to call witnesses, and establish that the State Bar's finding is the result of bias and prejudice against out-of-state licensed attorneys.

In summary, the Appellate Court has refused to acknowledge that the State Bar's exam for sister state attorneys is wholly arbitrary and capricious, and the Ninth Circuit's opinion is in direct conflict with this Court's precedent and the Congressional statutory scheme.

II. THIS CASE RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT

This Court has never addressed the issue of whether a Federal District Court can limit general admission to attorneys licensed by the State in which the Federal District Court is located. The Ninth Circuit cited and adopted In Matter of *Roberts*, 682 F.2d 105 (3d Cir. 1982) for the proposition that a District Court can generally exclude all out-of-state licensed attorneys. However, *In Re Roberts* has been undercut by *Piper* and its progeny. The Ninth Circuit's opinion also fails to explain why the respondent District Courts, while having no examination of their own, provide Full Faith and Credit to the Public

Acts and Records that establish California licensed attorneys are competent and ethically qualified to vindicate Federal rights, but the respondent District Courts do not provide Full Faith and Credit to the Public Acts and Records that establish Pennsylvania and New Jersey licensed attorneys are competent and ethically qualified to vindicate federal rights. See Art. 4, Sec. 1 App. 46.

This Court, also has never addressed the issue of whether a Federal District court can disqualify from pro hac vice admission all out-of-state licensed attorneys who live or work within the State in which the District Court is located. This Court has held a District Court cannot deny general admission based on residency. As such, it would appear a District Court cannot deny pro hac vice admission based on residency.

Finally, this Court has not previously addressed the issue of why a number of Federal District Courts do not accommodate the present mobility of our federal bar in an era where there is an ever increasing demand for specialized legal services regardless of state boundaries. See *Comisky and Patterson, The Case for a Federally Created National Bar by Rule or by Legislation*, 55 Temple L.Q. 945 (1982). The failure of a number of Federal District Courts to provide for reciprocity is ludicrous when federal law and procedure is uniform throughout the country, and twenty-five states accommodate out-of-state attorneys by providing for reciprocity for out-of-state licensed attorneys. See *Supreme Court of Virginia v. Friedman* (supra), 108 S Ct. at 2267. C.J. Rehnquist in dissent with J. Scalia ("The Court's ruling penalizes Virginia, which has at least gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those states which allow no reciprocal admission on motion").

Discriminatory local federal admission rules buttress state attorney discrimination. Moreover, there is no legitimate reason in our modern society for an out-of-state corporate defendant, that is brought into federal court in a diversity suit, to be required to retain local counsel. These discriminatory federal attorney admission rules are not "necessary" and smack of economic protectionism. Accord Respondent District Judge Tashima. See *anti*, page 6.

This Court is respectfully requested to grant certiorari also because Petitioner's case is not atypical. Petitioner relocated to California pursuant to an offer of legal employment. He has both worked for the Federal government in a highly specialized area of law and has specialized in Federal law. Petitioner is admitted to practice in the Northern District of California, the United States Court of Appeals for the Ninth Circuit, and is eligible for admission to the bar of this Court. Nevertheless, Petitioner is not eligible for either general or pro hac vice admission in the respondent District Courts that are located in the State where Petitioner presently lives and works. This anomaly begs for correction.

CONCLUSION

For the foregoing reasons, Petitioner respectfully urges this Court to grant his Petition for Writ of Certiorari and to reverse the judgment of the U.S. Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH R. GIANNINI, *Plaintiff-Appellant,* v. MANUEL L. REAL, et al.; A. WALLACE TASHIMA, *Defendants-Appellees.*	No. 89-55466 D.C. No. CV-88-6279-SAW OPINION

Appeal from the United States District Court
for the Central District of California
Stanley A. Weigel, District Judge, Presiding

Argued and Submitted
May 8, 1990 – Pasadena, California

Filed August 16, 1990

Before: Procter Hug, Jr., Cynthia Holcomb Hall and Stephen S. Trott, Circuit Judges.

Opinion by Judge Hug

COUNSEL

Joseph R. Giannini, pro per, Marina del Rey, California, for the plaintiff-appellant.

Roger E. West, Assistant United States Attorney, Los Angeles, California, for all federal defendants-appellees.

Christopher G. Caldwell, Hedges, Powe & Caldwell, Los Angeles, California, for the defendant-appellee Tashima.

Lawrence C. Yee, Committee of Bar Examiners, San Francisco, California, for all state defendants-appellees.

OPINION

HUG, Circuit Judge:

This case presents two issues: (1) whether the California Bar Examination and its grading process are constitutional; and (2) whether the Local Rules of the United States District Courts for the Central, Southern and Eastern Districts of California, which require attorneys seeking admission to those courts to be members in good standing of the California State Bar, are constitutional. The district court held both the bar examination and the local rules to be constitutional. We affirm.

I. *Procedural Background*

Joseph R. Giannini, a California resident, is an attorney who passed the New Jersey and Pennsylvania bars. After failing the California bar twice, Giannini challenged the constitutionality of the California Bar Examination. *Giannini v. The Comm. of Bar Examiners*, C-87-3797-JGD. We affirmed the district court's dismissal of that action, holding that Giannini had failed to appeal to the state supreme court which has the authority to grant or deny admission to the bar, and that Giannini therefore had suffered no deprivation under federal law. *Giannini v. The Comm. of Bar Examiners*, 847 F.2d 1434, 1435 (9th Cir. 1988).

In a separate action, Giannini challenged the federal district courts' local admission rules, which require membership in the State Bar of California (collectively, the

"challenged local rules").[1] *Giannini v. Real,* C-88-012467. The district court ordered the action stayed until Giannini had fully exhausted his administrative remedies with the State Bar of California.

In July, 1988, Giannini filed a Petition for Admission and Other Declaratory Relief with the California Supreme Court. On October 12, 1988, the California Supreme Court denied the petition in a one-line order.

Giannini filed the instant complaint on October 24, 1988, challenging his denial to practice law in the State of California, and in the United States District Courts for the Central, Southern and Eastern Districts of California.

The defendants in Giannini's action are: The California Supreme Court and the named Justices of that Court, The Committee of Bar Examiners and the Committee's Members (collectively referred to as "State Defendants"), and the said District Courts and the named Judges of those Courts (collectively referred to as "Federal Defendants").

Giannini moved for summary judgment for admission to practice in the named federal district courts and

---

[1] The challenged bar membership rule of the Central District reads:

> Central District of California – Local Rule 2.2.1:
>
> Admission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

Local Rule 110-3(a)(1) of the Southern District and Local Rule 180(a) of the Eastern District are nearly identical.

for a preliminary injunction ordering admission to the California bar. He also moved for default judgment against individually named members of the Committee of Bar Examiners and for criminal sanctions against the Committee's attorneys. The State and Federal Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim.

The district court denied Giannini's motions and dismissed Giannini's claims. *Giannini v. Comm. of Bar Examiners*, 711 F. Supp. 992 (C.D. Cal. 1989). Giannini timely appealed pro se the district court's dismissal of his claims against the Federal and State Defendants.

II. *Claims Against the State Defendants*

Giannini alleges that the California Supreme Court and the Committee of Bar Examiners have violated the Fourteenth Amendment's Due Process and Equal Protection Clauses, the Privilege and Immunities Clause of art. IV, § 2, and the Commerce Clause of art. I, § 8. Giannini also brings claims for damages pursuant to 42 U.S.C. §§ 1983 and 1985 against the Committee and its members. Finally, Giannini brings state law claims against the Committee based on alleged breach of contract and fraud.[2]

A. *Claimed Constitutional Violations*

The district court dismissed Giannini's constitutional claims against State Defendants on the grounds of *res*

---

[2] The district court properly dismissed Giannini's two pendent state law claims against the Committee for lack of jurisdiction. *See Giannini*, 711 F. Supp. at 996.

judicata based on the ruling of the California Supreme Court. *Giannini,* 711 F. Supp. at 997. We decline to discuss this issue. We find that even if Giannini's claims were not barred by *res judicata,* he still failed to state a valid constitutional claim. We discuss Giannini's claims in turn.

1. *Procedural Due Process*

Giannini asserts that he was denied his procedural due process because he was not provided "any reason or notice" on why he failed the bar examination or "any opportunity to be heard or present any claim or defense" to the California Supreme Court and because the California Supreme Court decision denying his admission did not include a written opinion. We find this argument to be unpersuasive.

The rules governing admission to the California bar provide that an unsuccessful bar applicant can see his examination. *See* Cal. Bus. & Prof. Code § 6065 (West 1990). Accordingly, Giannini was able to see why he failed. Further, the rules provide that an unsuccessful applicant can petition the supreme court for review of the denial of his admission. *See* Cal. Bus. & Prof. Code § 6066 (West 1990). Giannini petitioned the California Supreme Court and had an opportunity to present his claim before the supreme court via the petition. *See Kremer v. Chem. Constr. Corp.,* 456 U.S. 461, 481 (1982) (a "full and fair opportunity" means that the "state proceedings need do no more than satisfy the minimal procedural requirements for the Fourteenth Amendment's Due Process Clause."). We therefore find that the State provided Giannini with procedural due process. *See Sutton v. Lionel,* 585

F.2d 400, 403 (9th Cir. 1978)(holding that the rules governing admission to the Nevada bar, which allow the unsuccessful applicant to see his exam and petition the Nevada Supreme Court for review of the applicant's denial of admission, satisfy the requirements of due process).[3]

2. *Privileges and Immunities Clause*

Giannini alleges that the Committee discriminates against attorneys licensed in other states by forcing them to take the California bar once they have already passed their own state's bar. Giannini argues that this violates the Privileges and Immunities Clause. We disagree.

Discrimination on the basis of out-of-state residency is a necessary element for a claim under the Privileges and Immunities Clause. *See Levanti v. Tippen*, 585 F. Supp. 499, 507 (S.D. Cal. 1984) ("The lack of disparate treatment of non-residents . . . eliminates the possibility of a barrier to interstate travel."). There is no discrimination on the basis of non-residency or citizenship in California because neither California citizenship nor residency is a requirement for California bar applicants. *Id.*[4] The absence of any disparate treatment of nonresidents is fatal to Giannini's claims.[5]

---

[3] *Accord Lucero v. Ogden*, 718 F.2d 355, 357 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984); *Poats v. Givan*, 651 F.2d 495, 496-97 (7th Cir. 1981); *Davidson v. State of Georgia*, 622 F.2d 895, 897 (5th Cir. 1980); *Whitfield v. Ill. Bd. of Law Examiners*, 504 F.2d 474, 477-79 (7th Cir. 1974).

[4] Giannini is a California resident. Thus, even if a California residency requirement existed, it would not affect Giannini.

[5] Giannini claims his right to travel was violated. He also claims the right to travel is derived from the Commerce

(Continued on following page)

3. *Equal Protection*

Giannini also argues that the California Bar Examination's format and grading process violates the Equal Protection Clause under the Fourteenth Amendment. To support this claim, Giannini notes the high percentage of attorneys who fail the California bar. Moreover, he asks this court to use the strict scrutiny standard when applying the Equal Protection analysis. We do not find Giannini's argument to be persuasive nor do we accept his proposed standard of scrutiny.

When analyzing a discrimination claim under the Fourteenth Amendment, we must first determine the appropriate level of scruntiny to be applied. If the rule disadvantages a suspect class or impinges upon a fundamental right, the court will examine it by applying a strict scrutiny standard. If no such suspect class or fundamental rights are involved, the conduct or rule must be analyzed under a rational basis test. *Lupert v. Cal. St. Bar,* 761 F.2d 1325, 1327-28 (9th Cir. 1985). Here, the challenged bar examination neither impairs a fundamental right nor discriminates against a suspect class. There is no fundamental right to practice law or to take the bar examination. Attorneys do not constitute a suspect class. *Id.* at 1327 n.2. Therefore, a rational level of scrutiny is used.

(Continued from previous page)

Clause. We need not delve into the right-to-travel cases. The lack of disparate treatment of non-residents or recent arrivals eliminates the barrier to interstate travel. *See Levanti,* 585 F. Supp. at 507.

Overwhelming legal authority supports this view that review of state procedures for bar admissions and testing is guided by the rational basis standard. *Schware v. Bd. of Examiners*, 353 U.S. 232, 238-39 (1957).[6] Further, our cases hold that a state need not use a professionally validated examination or, as Giannini suggests, a more reliable measure of professional competence, *see Tofano v. Sup. Ct. of Nev.*, 718 F.2d 313, 315 (9th Cir. 1983) (citing *Tyler v. Vickery*, 517 F.2d 1089, 1102 (5th Cir. 1975)), and that an examination is not invalidated on the basis of a low percentage of passing applicants. *Chaney v. State Bar of Cal.*, 386 F.2d 962, 965-66 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968).

It is clear that each state is free to prescribe the qualifications for admission to practice for those lawyers who appear in its courts. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). California has the right to make its examination more comprehensive and difficult than other states. *Chaney*, 386 F.2d at 964-65. We find that the format and grading process of the California Bar Examination bear a rational connection to the practice of law. We also hold that allowing California to set its own bar examination standards is rationally related to the legitimate government need to ensure the quality of attorneys within the state.

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[6] *Accord Tofano v. Sup. Ct. of Nev.*, 718 F.2d 313 (9th Cir. 1983); *Sutton*, 585 F.2d at 403; *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011 (1968); *Levanti*, 585 F. Supp. at 507.

4. *Commerce Clause*

Giannini also contends that the bar examination is anti-competitive in that it unreasonably burdens free trade among states. He relies upon *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), in making this Commerce Clause argument. The Commerce Clause restricts actions by states which unduly burden interstate commerce or otherwise encroach upon legitimate federal authority. *See White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 213 (1983).

In *Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), the Seventh Circuit examined a Commerce Clause action in which a Missouri attorney, residing in Missouri, challenged the Illinois requirement of making non-residents take the Illinois bar. The Missouri attorney charged that the requirement violated both the Privilege and Immunities Clauses and the Commerce Clause. The Seventh Circuit held that when looking at the same alleged discrimination under the different clauses, the same standard should be used. *Id.* As the court found no privilege and immunities violation, it found no violation of the Commerce Clause. We adopt this analysis here.

In reviewing a claim under the Commerce Clause, "the court examined both the gravity of the interference with free interstate trade and the justifications offered for it, to see whether the burden is an unreasonable one in the circumstances." *Id.* Here, we do not find it to be an unreasonable interference with commerce for attorneys of other states to be required to take the California bar to be able to practice in California.

B. *Section 1983 and 1985 Damage Claims*

To state a claim under 42 U.S.C. §§ 1983 and 1985, it is necessary to allege facts showing deprivation of rights secured by the Constitution or laws of the United States under color of state law. *Karim-Panahi v. Los Angles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988). Here, Giannini asserts constitutional claims against public officials. However, merely because public officials are involved, Giannini's state law tort claims are not transmuted into claims of deprivation of federal constitutional rights. *Havas v. Thorton*, 609 F.2d 372, 374 (9th Cir. 1979). As we discussed above, we find that Giannini has failed to establish a violation of constitutional rights. Therefore, his section 1983 claim must fail.

Similarly, Giannini's claim against the Committee under 42 U.S.C § 1985 also fails because deprivation of federal constitutional rights is a necessary element of the alleged conspiracy. *Id.* As we have already explained, Giannini fails to show that the Committee caused him such deprivation.

C. *Giannini's Motions*

1. *Motion for Preliminary Injunction*

Giannini's motion for preliminary injunction ordering admission to the California bar was based on the same alleged constitutional violations discussed above. Therefore, because he failed to state a constitutional claim, the district court did not abuse its discretion in denying the preliminary injunction motion.

2. *Motion for Default Judgment*

Giannini seeks a $1 million dollar default judgment against Committee members of the Committee of Bar Examiners because they allegedly failed to respond to his service of process. The court did not abuse its discretion in denying this motion because Giannini failed to properly effectuate service. *See* Fed. R. Civ. P. 4(c); *Giannini*, 711 F. Supp. at 997-98.

3. *Motion for Sanctions*

Further, it was not an abuse of discretion for the district court to order Giannini's motion for sanctions to be re-noticed because the motion was untimely. *See* Central District of California Local Rule 220-2. *Giannini*, 711 F. Supp. at 998.

III. *Claims Against the Federal Defendants*

A. *Constitutional Claims*

The Local Admission Rules of the United States District Courts for the Central, Eastern, and Southern Districts of California limit membership in the bars of those courts to "persons of good moral character who are active members in good standing of the State Bar of California." *See* Local Rules, *supra*, at note 1.

Giannini alleges that this requirement violates the Due Process Clause of the Fifth Amendment, the Full Faith and Credit Clause, and the Right-to-Travel. Giannini also asserts that the local rules violate the principles of "right and justice."

The district court found that the Local Rules of the Central, Southern and Eastern Districts of California do not violate equal protection, due process, or any other constitutional rights. *See Giannini,* 711 F.Supp. 999-1000. We discuss each of these contentions.

1. *Equal Protection*

Giannini contends that the local rules violate his constitutional right to equal protection implicit in the Fifth Amendment to the United States Constitution. His theory is that the rules "discriminate" in favor of attorneys who are admitted to the State Bar of California.

Here, the challenged rules do not involve the impairment of a fundamental right because there is no fundamental right to practice law. Further, lawyers are not a suspect class. Therefore, a rational level of scrutiny is used. *See Lupert,* 761 F.2d at 1327.

Federal Defendants state six reasons why bar applicants to the named federal district courts in California must be members in good standing of the California Bar:

> (1) the defendant district courts, having no relevant procedures of their own, rely on the California bar examination for determination of fitness to practice law; (2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the California bar provides the district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation; (4) allegations of professional misconduct can be brought to the attention of the State Bar; (5) such membership helps screen

> applicants who are guilty of ethical misconduct in any other jurisdiction; and (6) attorneys who are members of the California and the district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests.

Giannini, 711 F.Supp. at 1000.

The six considerations set out by Federal Defendants amply satisfy the requirement of a rational basis for the classification. *See Maynard v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 701 F. Supp. 738, 741-43 (C.D. Cal. 1988).

2. *Full Faith and Credit Clause*

Giannini also asserts that retesting of out-of-state attorneys violates the Full Faith and Credit Clause. The Full Faith and Credit Clause provides that: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. Giannini's claim lacks merit because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that Giannini is entitled to practice law in California. *See Giannini*, 711 F. Supp. at 1000.[7]

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[7] Giannini also asserts a right-to-travel claim against Federal Defendants. This claim lacks validity here, as it did against State Defendants. *See also Hawkins v. Moss*, 503 F.2d 1171, 1178-79 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

B. *Rules of the Supreme Court*

Giannini also alleges that the challenged local rules are inconsistent with the Rules of Practice and Procedural of the United States Supreme Court. We disagree.

28 U.S.C. § 2071(a) (1988) states that:

> The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed [by the Supreme Court].

Supreme Court Rule 5.1 requires that an applicant for admission to practice in that Court must be "admitted to practice in the highest court of the State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application."

In *Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982), Local Rule 4 of the United States District Court for the District of New Jersey limited practice before it to members of the New Jersey bar. Roberts challenged the rule on the identical ground of inconsistency urged by Giannini. In *Roberts*, 682 F.2d at 109, the court found that nothing in the challenged rule was inconsistent with the Supreme Court Rule 5.1. Following *Roberts*, we find that the challenged local rules are not inconsistent with the Supreme Court's Rules of Practice and Procedure. The Supreme Court's Rule only concerns admission to practice before that court. It does not prescribe the requirements to practice before federal district courts. The district court admission rules differ from the Supreme Court admission rules but are not inconsistent in that they each deal with separate

courts. Local District Court Rules are not required to mirror Supreme Court Rules.

C. *Supervisory Authority*

Judge Tashima, one of the named federal judge defendants, in a separate brief, urged this court not to reach the constitutional arguments, contending that we should, in the exercise of our supervisory authority, require an amendment to the District Court Rules. He basis his argument primarily on the case of *Frazier v. Heebe*, 482 U.S. 641 (1987). In *Frazier*, Local Rule 21.2 of the Eastern District of Louisiana required that attorneys who were members of the bar of the State of Louisiana either reside or maintain an office in Louisiana in order to be admitted to the bar of that district court. The Court in *Frazier*, utilizing the "right and justice" standard in the exercise of its supervisory authority, held that the residency based rule was "unnecessary and irrational." *Id.* at 646. In so holding, the Court stated:

> [T]here is no reason to believe that nonresident attorneys who have passed the Louisiana bar examination are less competent than resident attorneys. The competence of the former group in local and federal law has been tested and demonstrated to the same extent as that of Louisiana lawyers, and its members are equally qualified. . . . A lawyer's application to a particular [district court] bar is likely to be based on the expectation of considerable local practice, since it requires the personal investment of taking the state bar examination and paying fees and annual dues. Moreover, other more effective

> means of ensuring the competence of bar members are available to the district courts, including examination or seminar attendance requirements.

Id. at 647-48.

Frazier is distinguishable from the instant case. *Frazier* is based on a local rule requiring residency. Here, a requirement of admission to the state bar, not a requirement of residency, is involved. In *Frazier*, the Court noted that the attorneys, although not residents, were competent because they had passed the Louisiana bar exam. Here, Giannini is a resident. However, he has not proved his competency because, unlike the attorney in *Frazier*, Giannini has not passed the state's bar.

We find that the challenged local rules, which require an attorney to pass the California bar before practicing in a federal district court, pass the "right and justice" standard. The district court discussed the reasons expressed for the District Court Rules and found them to satisfy the requirement for a rational basis for the classification. *Giannini*, 711 F.Supp. at 999. We agree, and, therefore, we affirm the district court's holding that the challenged local rules do not exceed the district court's power to promulgate local rules to conduct business.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOSEPH R. GIANNINI,

Plaintiff,

vs.

MANUEL L. REAL, THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ALBERT LEE, STEPHENS, JESSE W. CURTIS, FRANCIS C. WHELAN, IRVING HILL, A. ANDREW HAUK, WILLIAM P. GREY, DAVID W. WILLIAMS, ROBERT J. KELEHER, LAWRENCE T. LYDICK, LAUGLIN E. WATERS, WILLIAM M. BYRNE, ROBERT M. TAKASUGI, MARINA R. PFAELZER, TERRY J. HATTER, JR., A. WALLACE TASHIMA, DAVID V. KENYON, CONSUELO B. MARSHALL, RICHARD A. GADBOIS, JR., EDWARD RAFEEDIE, PAMELA A. RYMER, HARRY L. HUPP, ALICEMARIE H. STOTLER, WILLIAM J. REA, JAMES M. IDEMAN, WILLIAM D. KELLER, FERDINAND F. FERNANDEZ, STEPHEN V. WILSON, J. SPENCER LETTS, DICKRAN TEVRIZIAN, JOHN G. DAVIES, RONALD S.W. LEW, CALIFORNIA SUPREME COURT, MALCOM LUCAS, STANLEY MOSK, ALLEN BROUSSARD, EDWARD PANELLI, JOHN ARGUELLES, DAVID EAGLESON, MARCUS KAUFMAN, THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, GORDON

No. C-88-6279 SAW

(Filed April 20, 1989)

THOMPSON, JR., WILLIAM ENRIGHT,)
EARL GILLIAM, HOWARD)
TURENTINE, RUDI BREWSTER, JOHN)
RHODES, THE UNITED STATES)
DISTRICT COURT FOR THE EASTERN)
DISTRICT OF CALIFORNIA,)
LAWRENCE KARLTON, MILTON)
SCHWARTZ, EDWARD DEAN PRICE,)
RAUL RAMIREZ, ROBERT COYLE,)
EDWARD GARCIA, THOMAS)
MacBRIDE, PHILLIP WILKINS, M.D.)
CROCKER, THE COMMITTEE OF BAR)
EXAMINERS, JEANNE RAY, EDWARD)
COSTELLO, FERNANDO D.)
DeNOECHEA, GALAL S. GOUGH,)
JUDY JOHNSON, FULTON HAIGHT,)
FERN LAETHEM, JOHN R. STOKES,)
MICHAEL R. YAMAKI, HOYT ZIA,)
)
Defendants.)

MEMORANDUM AND ORDER

Plaintiff brings this action challenging his denial to practice law in the State of California, and in the United States District Courts for the Central, Southern and Eastern Districts of California. Defendants are the California Supreme Court, the named justices of that court, the said District Courts, the named judges of those courts, the Committee of Bar Examiners of the State Bar and its committee members.[1]

[1] The title in plaintiff's complaint misspells the names of some defendants. Since these errors do not preclude identification, the title in this Memorandum and Order conforms to that in the complaint.

Plaintiff moves for summary judgment for admission to practice in the named federal district courts and for a preliminary injunction ordering admission to the California bar. He also moves for default judgment against the individually named members of the Committee of Bar Examiners and for criminal sanctions against the Committee's attorneys, Truitt Richey and Diane Yu.

The California Supreme Court, its justices and the Committee of Bar Examiners (hereinafter, collectively referred to as the state defendants) move to dismiss for lack of subject matter jurisdiction and for failure to state a claim. The said District Courts and their judges (hereinafter, collectively referred to as the federal defendants) also move to dismiss for lack of subject matter jurisdiction. Defendant Judge Tashima moves in the alternative to stay the action. The remaining federal defendants move to dismiss for failure to state a claim upon which relief can be granted.

I. Background.

Plaintiff alleges that he graduated from Temple University, an American Bar Association accredited law school, and that he was admitted to practice before the Supreme Court of Pennsylvania, the Supreme Court of New Jersey, the United States District Court for the Eastern District of Pennsylvania, the United States District Court for the District of New Jersey, the United States District Court for the Northern District of California, the

United States Court of Appeals for the Ninth Circuit, and the United States Tax Court.[2]

Plaintiff's complaint goes on to allege that he took the July, 1986, and February, 1987, California Bar Examinations but did not receive an overall passing score.

The present action is not the first brought by plaintiff relating to denial of admission to practice law. He initially challenged the constitutionality of the California Bar Examination in a prior action filed in this Court. *Giannini v. The Committee of Bar Examiners,* C-87-3797 JGD. The Ninth Circuit Court of Appeals affirmed the dismissal of the action, noting that plaintiff had failed to appeal to the state supreme court which had the authority to grant or deny admission to the bar, and that plaintiff therefore had suffered no deprivation under federal law. *Giannini v. The Committee of Bar Examiners,* 847 F.2d 1434, 1435 (9th Cir. 1988).

In a separate action, plaintiff challenged this Court's local admission rule. *Giannini v. Real,* C-88-012467. The Court ordered the action stayed until plaintiff "fully exhausts his administrative remedies with regard to the State Bar of California." Order Staying Plaintiff's Action, Civil No. 88-1467-RB, August 25, 1988, at 4.

In July, 1988, plaintiff filed a Petition for Admission and Other Declaratory Relief with the California Supreme Court. On October 12, 1988, the California Supreme Court denied the petition in a one line order.

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[2] These allegations are not challenged. In view of plaintiff's acceptance as a practitioner in all those courts, his claims merit careful consideration.

Plaintiff filed the instant complaint on October 24, 1988.[3] Because the complaint names as defendants all judges of this Court, the Chief Judge of the Ninth Circuit designated and assigned the undersigned to perform the duties in this case as United States District Judge for the Central District of California.

II. Claims Against the State Defendants.

Plaintiff alleges that the California Supreme Court and the Committee of Bar Examiners have violated the fourteenth amendment's due process and equal protection clauses, the privileges and immunities clause of article IV, section 2, and the commerce clause of article I, section 8. Complaint, Counts 1-5. Plaintiff also brings claims for damages pursuant to 42 U.S.C. §§ 1983 and 1985 against the Committee and its members. Complaint, Counts 9-10. Finally, plaintiff brings state law claims against the Committee based on alleged breach of contract and fraud. Complaint, Counts 7-8.

A. Subject Matter Jurisdiction.

1. Review of the State Court Decision.

The state defendants are correct in asserting that this Court lacks subject matter jurisdiction because the complaint seeks review of a state court judicial determination. *District Court of Appeals v. Feldman*, 460 U.S. 462, 476

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[3] The parties agreed in open court on January 3, 1989, that a prior action, *Giannini v. Real*, C-88-012467, would be treated as dismissed.

(1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *see* 28 U.S.C. § 1257. Plaintiff's petition to the California Supreme Court asked that court to "grant his admission to the California bar, declare the present Committee testing scheme to be improper under California law and/or unconstitutional, and award attorney fees." Petition, Exhibit 101 to Federal Defendant's Motion, at 3. The California court thus had to "investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' " *See Feldman*, 460 U.S. at 479 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908)). The California Court's denial was therefore a judicial determination.

This does not end the inquiry, however. A plaintiff can bring two types of challenges to bar admissions: " 'The first is a constitutional challenge to the state's general rules and regulations governing admission; the second is a claim, based on constitutional or other grounds, that the state has unlawfully denied a particular applicant admission.' " *Feldman*, 460 U.S. at 485 (quoting *Doe v. Pringle*, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied* 431 U.S. 916 (1977)).

> United States district courts . . . have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings. . . .

Feldman, 460 U.S. at 486.

This Court therefore does not have jurisdiction if it "would have to go beyond mere review of the state rule *as promulgated*, to an examination of the rule *as applied* by the state court to the particular factual circumstances of [the applicant's] case." *Razatos v. Colorado Supreme Court*, 746 F.2d 1429, 1433 (10th Cir. 1984), *cert. denied* 471 U.S. 1016 (1985) (emphasis in the original). In addition, "[i]f the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar," *Feldman* at 483-484, n.16, the district court does not have subject matter jurisdiction.

In his first cause of action, plaintiff asserts that his procedural due process rights were violated because (1) the Committee did not provide reasons or notice as to why plaintiff failed the California Bar Examination, and (2) neither the Committee nor the California Supreme Court provided plaintiff an opportunity to be heard or to present a claim or defense. This count asks the Court to review directly the California Supreme Court's determination, and to overrule it by ordering that court to admit plaintiff to its bar. This demand is inextricably intertwined with the California court's denial, and therefore this Court is without jurisdiction to address it.

The remaining claims do not require any direct review of plaintiff's application to the California Supreme Court. They challenge the California Bar Examination as unconstitutional per se. Therefore, this Court has subject matter jurisdiction over these general challenges.

2. The Eleventh Amendment.

The Committee of Bar Examiners asserts that the Court's jurisdiction is barred by the eleventh amendment to the United States Constitution. The eleventh amendment prevents federal courts from asserting jurisdiction in suits brought against the states. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). Such sovereign immunity extends to the Committee as an agency of the state, *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir.), *cert. denied*, 474 U.S. 916 (1985); *Ginter v. State Bar of Nevada*, 625 F.2d 829, 830 (9th Cir. 1980), and to the California Supreme Court.

The eleventh amendment does not prohibit prospective, non-monetary injunctive or declaratory relief against state officials to protect federal rights. *Quern v. Jordan*, 440 U.S. 332, 357 (1979); *Lupert*, 761 F.2d at 1327. Plaintiff has named as defendants the individual justices and the members of the Committee of Bar Examiners. Accordingly, the Court will exercise jurisdiction over plaintiff's claims for such relief.

Plaintiff also seeks compensatory damages in the amount of $1,000,000 from the state defendants. The eleventh amendment bars suits for damages brought against state officials acting in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). Plaintiff's claims for damages based on the state defendant's official conduct are thus barred.

Plaintiff also raises two pendent state law claims against the Committee. Complaint, Counts Seven and

Eight. This Court has no jurisdiction over them, *Pennhurst*, 465 U.S. at 120, and they must be dismissed.

3. Substantial Federal Question.

The state defendants argue finally that plaintiff's claim is so "wholly insubstantial and frivolous" as not to involve a federal controversy. A federal question is jurisdictionally insubstantial if "it is patently without merit, or so insubstantial, improbable, or foreclosed by Supreme Court precedent as not to involve a federal controversy." *Demarest v. United States*, 718 F.2d 964, 966 (9th Cir. 1983), *cert. denied* 466 U.S. 950 (1984) (citing *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 70-71 (1978)).

Defendants argue that plaintiff's challenge is foreclosed by *Gormely v. Committee on Examinations and Admissions of the Supreme Court of Arizona*, 419 U.S. 810 (1974), in which the United States Supreme Court dismissed an appeal from the Supreme Court of Arizona for want of a substantial federal question. *Gormley* "stands firmly for the proposition that from a constitutional standpoint the several states have the right to set the criteria for the practice of law in their respective jurisdictions." *O'Neal v. Thompson*, 559 F.2d 485, 486 (9th Cir. 1977). Although the states may set their own criteria, they must still abide by the Constitution. *See e.g. Supreme Court of Virginia v. Friedman*, 108 S. Ct. 2260 (1988) (holding that Virginia's residency requirement for admission to the State's bar

without examination violates the Privileges and Immunities clause). Plaintiff's challenges are therefore not foreclosed under *Gormley*, and will not be dismissed for want of a substantial federal question.

B. Failure to State a Claim Upon Which Relief Can Be Granted.

Defendants assert next that plaintiff cannot state a claim as to the constitutionality of the California Bar Examination because that issue was previously adjudicated by the California Supreme Court. A final judgment on the merits of an action precludes the same parties or their privies from relitigating issues that were raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Plaintiff raised each of his challenges to the examination in his petition to the California Supreme Court. *See* Petition, Exhibit 101 to Federal Defendant's Motion, at 24-25 (due process), 12-15 (equal protection claim), 15-21 (privileges and immunities claim), and 21-23 (commerce clause). *See also* Federal Defendant's Motion, Appendix I (paragraph by paragraph comparison).

The California Supreme Court's decision denying these challenges was a final decision appealable directly to the United States Supreme Court. *Konigsberg v. State Bar of California*, 353 U.S. 252, 254 (1957). Plaintiff sought no relief from that decision. Therefore, his claims adjudicated there are barred from pursuit here.

C. Plaintiff's Motions.

Plaintiff's motion for a preliminary injunction ordering admission to the California Bar is based on the same alleged constitutional violations and must therefore be denied.

Plaintiff also seeks entry of a default judgment in the amount of $1,000,000 against the individual members of the Committee of Bar Examiners.[4] He claims that they have not responded to his service of process.

Federal Rule of Civil Procedure 4(c) provides in part that a summons and complaint may be served upon an individual defendant "pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State. . . . "

Plaintiff asserts that he properly served the individual defendants pursuant to California Code of Civil Procedure § 415.20(b). That section provides for process if a copy of the summons and of the complaint "cannot with reasonable diligence be personally delivered". Plaintiff does not allege that these defendants could not be reached at their current addresses, or that any attempt at

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[4] Rule 55(a) of the Federal Rules of Civil Procedure provides that

> [w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

personal service was made. Plaintiff has not shown that with reasonable diligence process could not have been personally delivered.[5] The motion for entry of default must be denied.

Plaintiff moves finally for criminal sanctions against Truitt Richey and Diane Yu for perjury. This motion was not timely noticed for hearing. Accordingly, this motion, if it is to be pursued, must be re-noticed for hearing in accordance with Local Rule 220-2.

III. Claims Against the Federal Defendants.

The admission rules of the United States District Courts for the Central, Eastern and Southern Districts of California limit membership in the bars of those courts to "persons of good moral character who are active members in good standing of the State Bar of California." *See* Central District of California, Local Rule 2.2.1; Southern District of California, Local Rule 110-3; Eastern District of California, Local Rule 180. Plaintiff alleges that this requirement violates the due process clause of the fifth amendment, the full faith and credit clause, and an

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[5] The federal rule provides alternatively for service by mail. Such service, however, is only sufficient if an acknowledgment from the defendant is received by the sender. Fed. R. Civ. Proc. 4(c)(2)(C)(ii). Plaintiff does not allege that he has received such an acknowledgement.

Finally, under the Federal rules, if such acknowledgement is not received, service may be effected by delivering copies of the summons and complaint "to an agent authorized by appointment or by law to receive service of process." Fed. R. Civ. Proc. 4(d)(1). Plaintiff has not alleged any such service.

alleged constitutional "right to travel". Plaintiff also asserts that the local rules are "unlawful" because they "violate notions of federalism and offend principles of right and justice." Complaint, Count Six.

A. Subject Matter Jurisdiction.

The federal defendants assert that this Court may not exercise jurisdiction over the Eastern and Southern District Courts. Each district court is authorized to promulgate its own rules regulating the admission of attorneys practicing before it. *In re Wasserman*, 240 F.2d 213 (9th Cir. 1956); *see also* 28 U.S.C. § 2071; Fed. R. Civ. Proc. 83. Defendants thus conclude that any challenges to such rules must be brought in that same court.

Defendants offer no law to support this conclusion. 28 U.S.C. § 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This action obviously arises under the federal Constitution. Which district court is a proper forum is a question of venue, not one of jurisdiction.

B. Immunity.

The federal defendants assert that because they were acting in their legislative capacity, they are absolutely immune from suit. The enactment of rules is a legislative act, and thus protected by legislative immunity. *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 734 (1980). Although the complaint is unclear, plaintiff stipulated in court on January 3, 1989,

that he does not seek damages from the federal defendants. However, legislative immunity does not entitle a defendant to immunity from suits for declaratory or injunctive relief. *See Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978). Plaintiff's complaint seeks such relief and this Court accordingly denies the immunity sought by the federal defendants.

C. Failure to State a Claim Upon Which Relief Can be Granted.

1. Collateral Estoppel.

Plaintiff attacks the challenged district court rules governing admission to practice because they require the applicant to pass the allegedly unconstitutional California Bar Examination. The federal defendants are correct in asserting that the constitutionality of the examination was determined by the California Supreme Court, and that that determination is binding here. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979).

2. Alleged Violation of 28 U.S.C. § 2071.

Plaintiff also alleges that the relevant local rules are not consistent with the rules of practice and procedure of the Supreme Court. 28 U.S.C. § 2071 states that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Rule 5.1 prescribed by the Supreme Court requires that an applicant for admission to practice in that Court to have been " . . . admitted to practice in the highest court of a State, Territory, District, Commonwealth, or Possession for the three years immediately preceding the date of application. . . . "

In *Matter of Roberts*, 682 F.2d 105 (3d Cir. 1982), Local Rule 4 of the United States District Court for the District of New Jersey limited practice before it to members of the New Jersey bar. Roberts challenged the rule on the identical ground of inconsistency urged by plaintiff here. This Court agrees with the decision in *Roberts* totally rejecting the challenged for the reasons fully set forth at page 109.

3. Motion to Stay.

Judge Tashima moves to stay further consideration of the constitutionality of the rules, and asks the Court to invalidate the Local Rule of the Central District of California on the ground that it violates notions of right and justice.

In *Frazier v. Heebe*, 482 U.S. 641, 107 S. Ct. 2607 (1987), the Supreme Court exercised its "inherent supervisory power" to invalidate a local admission rule that was not consistent with " 'the principles of right and justice.' " 107 S. Ct. at 2611 (quoting *In re Buffalo*, 390 U.S. 544, 554 (1968)).

The challenged admission rule of the Eastern District of Louisiana in *Frazier* required that the attorney reside or maintain an office in Louisiana. The Supreme Court found both requirements "unnecessary and irrational."

Judge Tashima does not assert that the instant rule is irrational. Instead, he challenges it on the ground that it is "overbroad." He argues that for the most part the legal issues that arise in federal courts in California do not relate to California law; and that in any case, because the Bar Examination tests only a few areas of California law, membership in the California bar can not be equated with familiarity with California law.

District courts have discretion to determine the skills and qualifications required of their attorneys. *Frazier*, 107 S. Ct. at 2611.[6] The mere fact that the qualifications are not narrowly tailored does not make the rule so irrational and unnecessary as to offend notions of right and justice. In addition, the requirement of California bar membership serves a number of rational purposes noted, post, at pages 16-17.

4. Alleged Equal Protection and Due Process Violation.

Plaintiff claims that the Local Rules violate his rights to equal protection and due process protected by the Constitution of the United States. In support of these claim, he relies upon decisions holding that the right to practice law is protected under the privileges and immunities clause of the Constitution. U.S. Const. art. IV, § 2. Controlling decisions do so hold. *Barnard v. Thorstenn*, 109

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[6] In *Frazier*, the Supreme Court specifically noted that the appellant attorneys who were excluded from practice nonetheless had passed the relevant qualifying bar exam, and their skills and qualifications were not at issue.

S. Ct. 1294 (1989); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279 (1985). The fallacy of such reliance lies in the fact that the local rules do not treat lawyers of one state differently than those of another. Under those rules, all lawyers of all states including California are required to be members in good standing of the California state bar. Therefore, plaintiff's reliance upon the federal Constitution requires consideration only to equal protection and due process considerations.

The right to practice law is not a fundamental one guaranteed by the federal Constitution so far as equal protection is concerned. *Lupert v. California State Bar*, 761 F.2d 1325, 1327-28 (9th Cir.), *cert. denied*, 474 U.S. 916 (1985); *Maynard v. The United States District Court for the Central District of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988). Therefore, the strict scrutiny otherwise required is not applicable, and the Court need consider only whether the local rules are rationally based. *Lupert*, 761 F.2d at 1327-28; *Matter of Roberts*, 682 F.2d 105, 108 (3d Cir. 1982).

Defendants set out the following reasons for requiring that applicants be members in good standing of the California Bar: (1) the defendant district courts, having no relevant procedures of their own, rely on the California Bar Examinations for determination of fitness to practice law; (2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the California Bar provides the district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation; (4) allegations of professional misconduct can be brought to

the attention of the State Bar; (5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; (6) attorneys who are members of both the California and the district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the client's interests. These considerations amply satisfy the requirements of a rational basis for the classification. *See Maynard*, 701 F. Supp. at 743.

5. Alleged Violation of the Full Faith and Credit Clause.

Plaintiff claims that re-testing of out of state attorneys violates the full faith and credit clause. This clause provides that "[f]ull Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, section 1. 28 U.S.C. § 1738 states further that

> [s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Plaintiff's suggestion that because he is licensed in Pennsylvania and New Jersey, the district courts in California must not only recognize that he is licensed there, but also license him here, is entirely without merit. Neither Pennsylvania nor New Jersey determined that plaintiff is entitled to practice law in California.

6. Alleged Violation of the "Right to Travel".

Plaintiff baldly asserts that retesting of out of state attorneys violates the "right to travel". Denial of the right to practice law in the United States District Courts involved in this case is not a violation of any right to travel within the ambit of any federal constitutional provision. *See Hawkins v. Moss*, 503 F.2d 1171, 1178-9 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

For all of the foregoing reasons,

IT IS HEREBY ORDERED that:

1. The complaint is dismissed as to the California Supreme Court, the justices of that court, the Central, Eastern and Southern District Courts of the United States, the judges of those courts, and the Committee of Bar Examiners of the State Bar of California;

2. Plaintiff's motions for summary judgment, preliminary injunction and default judgment are DENIED; and

3. Plaintiff's motion for criminal sanctions against Truitt Richey and Diane Yu may be re-noticed for hearing in accordance with Local Rule 220-2, provided that plaintiff proceeds under that rule on or before May 22, 1989.

Dated: April 20, 1989

/s/ Stanley A. Weigel
Judge

No. S006299

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

(Filed Oct. 12, 1988)

JOSEPH L. GIANNINI

v.

COMMITTEE OF BAR EXAMINERS

The petition for writ of review is DENIED.

/s/ Lucas

Chief Justice

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOSEPH R. GIANNINI, Plaintiff,	)	CIVIL NO. 88-1467-RB(GHKx)
vs.	)	ORDER STAYING PLAINTIFF'S ACTION
MANUEL REAL, et al., Defendants.	)	(Filed Aug. 25, 1988) (Entered Aug. 31, 1988)

I. BACKGROUND

Plaintiff, Joseph Giannini ("Giannini") filed this action on March 20, 1988, naming as defendants, in their official capacities, the judges of the United States District Court for the Central District of California ("Central District"). Giannini is a resident of the State of California, having been domiciled in Los Angeles County in excess of one year. Giannini is a member of the State Bar of Pennsylvania and the State Bar of New Jersey, and of the district courts therein. Giannini has tried unsuccessfully on two separate occasions to pass the California Bar exam and become a member of the State Bar of California.

In his complaint, Giannini alleges that Local Rules 2.2.1 and 2.2.3.2 of the Central District ("Local Rules") are unconstitutional. Under Local Rule 2.2.1, admission to the Central District "is limited to persons of good moral character who are active members in good standing of the State Bar of California." Under Local Rule 2.2.3.2, an attorney who is not a resident of California can apply for *pro hac vice* status.

Giannini alleges that these Local Rules are unconstitutional under the Privileges and Immunities Clause of

Article IV, the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. The thrust of Giannini's argument is that the Local Rules are dependent on the State Bar of California's licensing scheme, which requires successful completion of the California Bar exam as a prerequisite. Giannini contends that the California Bar exam is unconstitutional, and, therefore, any Local Rule dependent on this exam must also be unconstitutional.

Giannini filed an earlier complaint in Federal court against the Committee of Bar Examiners challenging the constitutionality of the California Bar exam. *See Giannini v. Committee of Bar Examiners*, 843 F.2d 1196 (9th Cir. 1988). Giannini alleged that the California Bar exam unconstitutionally discriminated against out-of-state attorneys in violation of the Privileges and Immunities Clause of Article IV, the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. The District Court dismissed the complaint under Fed. R. Civ. P. 12(b)(6) for lack of subject matter jurisdiction. The district court held that subject matter jurisdiction was lacking because Giannini failed to appeal the Committee of Bar Examiners' decision to the California Supreme Court, which has the sole authority to admit or deny applicants to the bar.

The Ninth Circuit agreed that the district court lacked subject matter jurisdiction to the extent Giannini alleged discriminatory treatment against him personally. *See Giannini v. Committee of Bar Examiners*, 843 F.2d at 1196. With regard to the general challenges to the constitutionality of the California Bar Exam, the court held that

these claims were properly dismissed under Fed. R. Civ. P. 12(b)(6). *Id.* at 1196.

A Petition for Re-Hearing En Banc was submitted to the Ninth Circuit. The Ninth Circuit vacated their first opinion and held the complaint was barred until after an appeal was taken to the California Supreme Court. *Giannini v. Committee of Bar Examiners*, 87-6443 (filed June 6, 1988). Giannini has filed an appeal in the California Supreme Court.

On August 1, 1988, this court heard defendants' Motion to Dismiss and plaintiff's Motion for Summary Judgment.

II. ANALYSIS

A court should stay or dismiss an action pending exhaustion of administrative remedies to avoid unnecessarily reaching constitutional issues. *See e.g., Dean v. Nelson*, 472 U.S. 846 (1985). In this case, plaintiff might be able to obtain the relief he requests from the California Supreme Court.

The California Supreme Court could decide to admit Giannini, either on the basis that Giannini's California Bar exam was incorrectly graded or on the basis that the California Bar exam is unconstitutional. If the court determines Giannini is entitled to pass the California Bar exam or passage is waived, then Giannini need only pass the moral and professional responsibility standards established by the State of California and the bar of the Central

District. Assuming these additional tests were met, Giannini would be entitled to membership in the bar of the Central District.

In the present federal action before this Court, Giannini's requested relief is limited to membership in the bar of the Central District. Giannini does not represent a class of out-of-state-licensed attorneys, for whom relief might only be accorded by setting aside the Local Rules. Rather, Giannini can still seek his requested relief if this court defers reaching the merits of the constitutional claims at this time.

Thus, the court hereby denies defendants' Motion to Dismiss and Plaintiff's Motion for Summary Judgment without prejudice. Furthermore, the court orders that plaintiff's action be stayed until he fully exhausts his administrative remedies with regard to the State Bar of California. If the California Supreme Court or the United States Supreme Court determines Giannini should be admitted to the State Bar of California, plaintiff's case before this court is moot. If, however, plaintiff does not receive relief in the appellate courts, he is entitled to reactivate this action.

IT IS SO ORDERED.

DATED: AUG 25 1988

/s/ Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

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Cite as 88 Daily Journal D.A.R. 7916

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH R. GIANNINI, *Plaintiff-Appellant,* v. COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, et al., *Defendants-Appellees.*	No. 87-6443 D.C. No. CV-87-3797-JGD ORDER AND OPINION

Appeal from the United States District Court for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
March 11, 1988 – Pasadena, California

Order and Opinion Filed June 20, 1988

Before: Jerome Farris and Stephen Reinhardt, Circuit Judges, and Crocker,* District Judge.

Per Curiam

COUNSEL

Joseph R. Giannini, Pro per, Santa Monica, California, for the plaintiff-appellant.

Diane Yu, Ellen Peck, and Truitt A. Richey, Jr., San Francisco, California, for the defendants-appellees.

* Honorable M. D. Crocker, United States District Judge for the Eastern District of California, sitting by designation.

ORDER

The opinion filed April 5, 1988, and published at 843 F.2d 1196, is withdrawn.

OPINION

PER CURIAM:

Joseph Giannini appeals the dismissal of his amended complaint by the United States District Court for the Central District of California. Giannini filed suit when, after he failed the July, 1986 and February, 1987 California bar examinations, the Committee of Bar examiners for the State of California denied his petition for admission to practice law in that state. In his amended complaint, Giannini charged that the bar examination unconstitutionally discriminated against out-of-state attorneys. Among the constitutional provisions that the test implicated, according to Giannini, were the Privileges and Immunities Clause of Article IV; the Due Process and Equal Protection clauses of the Fourteenth Amendment; and the Commerce Clause. The district court dismissed Giannini's complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). We review this dismissal *de novo*. *Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986); *Clayton v. Republic Airlines, Inc.*, 716 F.2d 729, 730 (9th Cir. 1983).

Under California law, only the state supreme court, not the Committee of Bar Examiners, has the authority to grant or deny admission to the bar. *Chaney v. State Bar of*

California, 386 F.2d 962, 966 (9th Cir. 1967). The Committee operates as an administrative arm of the court but is not empowered to admit applicants. *Id.* Rather, the Committee administers the bar examination and certifies applicants meeting its requirements to the supreme court for admission. Cal.Bus. & Prof. Code §§ 6060, 6064. All Committee actions are reviewable by the supreme court and nonbinding upon it. *Siegel v. Committee of Bar Examiners*, 10 Cal. 3d 156, 110 Cal. Rptr. 15, 27 (1973). An applicant seeking review of a decision by the Committee must file a petition for review by the California Supreme Court. Cal. Bus. & Prof. Code § 6066; *Chaney*, 386 F.2d at 966. Until such review is completed, an applicant has no basis for any claim of deprivation under federal law because no deprivation has taken place. *See Chaney*, 386 F.2d at 966 (" . . . under California law a refusal of certification by the Committee is not a power of deprivation").[1]

This prerequisite to federal deprivation operates as a bar upon Giannini's suit in federal court. Although he petitioned the Committee, he never appealed its decision to the California Supreme Court. Not even a claim of futility, which Giannini has not made,[2] could excuse this lapse. *Id.* at 967.

AFFIRMED

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[1] As the *Chaney* court explained, this absence of deprivation distinguishes the requirement that an applicant petition the California Supreme Court from the standard exhaustion of state remedies that is waived in section 1983 suits. 386 F.2d at 966-67.

[2] Giannini has offered no explanation for his failure to petition the supreme court.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 87-03797

JOSEPH R. GIANNINI,
Appellant,
v.
THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, et al.,
Appellees.

The undersigned, counsel of record for appellees THE COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA, et al., certifies that there are no known interested parties other than those participating in the above-entitled case, nor are there any related cases pending in this Court.

DATED: December 22, 1987

/s/ Truitt A. Richey, Jr.
Truitt A. Richey, Jr.

ARTICLE IV – STATES – RECIPROCAL RELATIONSHIP BETWEEN STATES AND WITH UNITED STATES

U.S. Const., Art. 4.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const.

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation.

U.S. Const.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

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§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section –

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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42 U.S.C.

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the

duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of

the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such state or territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Central District Admission Rule

RULE 2. ATTORNEYS – ADMISSION, DISCIPLINE, SUBSTITUTION AND WITHDRAWAL, COMMUNICATIONS WITH COURT

2.1 APPEARANCE BEFORE THE COURT – Appearance before the Court on behalf of a party may be made

only by an attorney admitted to the Bar of or permitted to practice before this Court.

2.2 ADMISSION TO PRACTICE

2.2.1 IN GENERAL – Admission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

2.2.2 FAMILIARITY WITH FEDERAL RULES – An applicant (including a pro hac vice applicant) for admission to practice before this Court shall certify that he or she has read the Local Rules, the Local Criminal Rules, the F. R. Civ. P., the F. R. Crim. P., and the F. R. Evid., in their entirety.

2.2.3. PRO HAC VICE APPEARANCE

2.2.3.1 PERMISSION PRO HAC VICE – Any person who is not otherwise eligible for admission to practice before this Court, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear before this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate pro hac vice in a particular case.

2.2.3.2. DISQUALIFICATION FROM PRO HAC VICE APPEARANCE – Unless authorized by the Constitution of the United States or Acts of Congress, an applicant is not eligible for permission to practice pro hac vice if the applicant:

(a) resides in California; or

(b) is regularly employed in California; or

(c) is regularly engaged in business, professional, or other similar activities in California.

U.S. DISTRICT COURT - NORTHERN DISTRICT

RULE 110. ATTORNEY - ADMISSION TO PRACTICE - STANDARDS OF CONDUCT - RULES

RULE 110-1. ADMISSION TO THE BAR OF THIS COURT

Admission to and continuing membership in the bar of this court shall be limited to attorneys of good moral character who are active members in good standing of the bar of and who are eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States.

Each applicant for admission shall present to the clerk a written petition for admission in the form prescribed by the clerk. The petition shall be accompanied by a certificate of a member of the bar of this court stating that the applicant is known to that member and known to be of good moral character.

Upon qualification, the applicant may be admitted upon oral motion or without appearing, as determined by a judge, and upon signing the prescribed oath and paying the prescribed fee.

RULE 110-2. PRACTICE IN THIS COURT

(a) Practice and Appearance. Except as herein otherwise provided, only members of the bar of this court shall practice in this court. In every action or proceeding in which a party is represented by an attorney who either is not a member of the bar of this court or does not maintain an office within the State of California, the attorney shall designate in the pleadings an active member in good standing of the State Bar of California who maintains an office within California and is a member of the bar of this court upon whom copies of pleadings may be served and with whom the judge and opposing counsel may communicate concerning the conduct of the action.

(b) Pro Hac Vice. An attorney who is an active member in good standing of the bar of and who is eligible to practice before any United States Court or the highest court of any State, Territory or Insular Possession of the United States may, in the discretion of the judge, be permitted to appear in a particular action or proceeding.

Cal. Bus. & Prof. Code

§ 5087. Waiver of examination; accountant certified in another state; waiver or deferral of certain examination requirements

(a) The board may waive the examination requirements contained in Section 5082 and issue a certificate as a certified public accountant to any applicant who is a

holder of a valid and unrevoked certificate as a certified public accountant issued under the laws of any state, if the board determines that the standards under which the applicant received the certificate were as high as the standards established in this article and the applicant also complies with the following:

(1) He or she is over the age of 18, and has not committed acts or crimes constituting grounds for the denial of a certificate under Section 480.

(2) He or she is a bona fide resident of California, or has a place in California for the regular practice of public accountancy and is actively engaged in that practice although not necessarily so engaged personally in California.

(b) The board may in particular cases waive or defer any of the requirements regarding the circumstances in which the various parts of the examination are to be passed for an applicant from another state, upon a showing that, by reason of circumstances beyond the applicant's control, he or she was unable to meet the requirement.

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§ 6060.5. Different bar examinations for particular applicants

Neither the board, nor any committee authorized by it, shall require that applicants for admission to practice law in California pass different final bar examinations

depending upon the manner or school in which they acquire their legal education.

This section shall not prohibit the board, or any committee authorized by it, from establishing a different bar examination for applicants who are admitted to practice before the highest court of another state or of any jurisdiction where the common law of England constitutes the basis of jurisprudence.

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§ 6062. Out-of-state attorneys

To be certified to the Supreme Court for admission, and a license to practice law, a person, who has been admitted to practice law outside of this state, shall:

(a) Be of the age of at least 18 years.

(b) Be of good moral character.

(c) Have been admitted to practice before the highest court of a sister state or of any foreign state or country and (1) have been actively and substantially engaged in the practice of law in any such jurisdiction or jurisdictions for at least four years out of the six years immediately preceding the filing of his application for admission to practice in this state or (2) demonstrated to the satisfaction of the examining committee that his experience and qualifications qualify him to take an examination. Teaching in a law school accredited by the committee and services as a judge of a court of law shall be considered practice within the meaning of this section.

In determining what constitutes practice for at least four years out of the next six years immediately preceding the filing of the application, time spent, subsequent to September 16, 1940, and prior to two years after termination of hostilities between the United States and the nations with which the United States is now at war as determined by act of Congress or proclamation of the President, in active duty as a member of the United States Army, the United States Navy, the United States Marine Corps, the United States Coast Guard, or any of their respective components, or on active sea duty as an officer or member of the crew on or in connection with vessels documented under the laws of the United States, or vessels owned by, chartered to, or operated by or for the account or use of, the War Shipping Administrator, when the applicant is not engaged in the practice of law within the meaning of this requirement shall be excluded.

(d) Have passed such examination as in the discretion of the examining committee may be required; provided, however, that those persons admitted to practice law in a foreign state or country where the common law of England does not constitute the basis of jurisprudence shall be required to pass the final bar examination given by the examining committee to general applicants pursuant to subdivision (f) of Section 6060.

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§ 6065. Inspection of papers and grading

Any unsuccessful applicant for admission to practice, after he has taken any examination and within four

months after the results thereof have been declared, has the right to inspect his examination papers at the office of the examining committee located nearest to the place at which the applicant took the examination.

The applicant also has the right to inspect the grading of the papers whether the record thereof is marked upon the examination or otherwise.

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§ 6066. Review of refusal of certification

Any person refused certification to the Supreme Court for admission to practice may have the action of the board, or of any committee authorized by the board to make a determination on its behalf, pursuant to the provisions of this chapter, reviewed by the Supreme Court, in accordance with the procedure prescribed by the Court.

California Rules of Court

RULE 983. COUNSEL PRO HAC VICE

(a) [Eligibility] A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory or insular possession of the United States, and

who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an application.

Supreme Court, U.S.
FILED
NOV 19 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-543

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH R. GIANNINI, PETITIONER

v.

HONORABLE MANUEL L. REAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS (EXCEPT JUDGE A. WALLACE TASHIMA) IN OPPOSITION

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QUESTION PRESENTED

Whether the Local Rules of the United States District Courts for the Central, Southern, and Eastern Districts of California, which require attorneys seeking admission to those courts to be members in good standing of the California State Bar, are constitutional as applied to petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-543

JOSEPH R. GIANNINI, PETITIONER

v.

HONORABLE MANUEL L. REAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 911 F.2d 354. The opinion of the district court (Pet. App. 17-35) is reported at 711 F. Supp. 992.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1990. The petition for a writ of certiorari was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an attorney and a California resident. He is also a member of the New Jersey and Pennsylvania bars. After twice failing the California bar examination, petitioner filed a federal court action in 1987 challenging the constitutionality of that examination. The district court dismissed that action for lack of subject matter jurisdiction. *Giannini* v. *Committee of Bar Examiners*, No. C-87-3797-JGD (C.D. Cal.). The court of appeals affirmed, concluding that since petitioner had failed to appeal to the California Supreme Court, which has the authority to grant or deny admission to the bar, he had suffered no deprivation under federal law. *Giannini* v. *Committee of Bar Examiners*, 847 F.2d 1434, 1435 (9th Cir. 1988) (per curiam).

In March 1988, petitioner filed a separate federal court action challenging the constitutionality of Local Rule 2.2.1 of the United States District Court for the Central District of California, which provides that

> [a]dmission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California.

C.D. Cal. Local R. 2.2.1; see *Giannini* v. *Real*, No. C-99-1467-RB (C.D. Cal.). The district court stayed the action pending petitioner's exhaustion of administrative remedies before the State Bar of California. Pet. App. 37-41.

In July 1988, petitioner filed a "Petition for Admission and Other Declaratory Relief" with the California Supreme Court. Pet. App. 3. On October 12, 1988, the California Supreme Court summarily denied the petition. *Id.* at 36.

2. On October 24, 1988, petitioner filed a second federal court action against the federal and state respond-

ents, namely, the United States District Courts for the Central, Southern, and Eastern Districts of California and the judges of those courts (federal respondents), and the California Supreme Court and its justices and the Committee of Bar Examiners and its members (state respondents). Petitioner challenged the constitutionality of the applicable federal court local rules, which limit bar membership to active members of the California state bar, see C.D. Cal. Local R. 2.2.1; accord S.D. Cal. Local R. 110-3(a)(1); E.D. Cal. Local R. 180(a), as well as the constitutionality of the state bar examination. Pet. App. 18-21.[1] With respect to the federal respondents, petitioner alleged that the local district court rules violate the Due Process Clause, the Full Faith and Credit Clause, the constitutional "right to travel," principles of "right and justice," and the Rules of Practice and Procedure of this Court. *Id.* at 28-29.[2]

The district court dismissed each of petitioner's claims against the federal respondents. Pet. App. 32-35.[3] Relying on *In re Roberts*, 682 F.2d 105, 109 (3d Cir. 1982), the court first rejected the claim that the local court rules violate the Rules of this Court. Pet. App. 30-31. The court next determined that "[t]he right to practice law is not a fundamental one," and then concluded that the considera-

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[1] The district court—with the parties' agreement—treated petitioner's previously filed action as dismissed. Pet. App. 21 n.3.

[2] As petitioner is a private attorney, this case does not involve the effect of the statutory authority of the Attorney General to direct attorneys under the supervision of the Department of Justice to appear before federal courts. See 28 U.S.C. 509, 515-519, 533.

[3] The district court also dismissed petitioner's claims against the state respondents, Pet. App. 21-28, and the court of appeals affirmed, *id.* at 4-11. To the extent petitioner renews those claims before this Court, see Pet. 25-30, they merit no further review.

tions underlying the local rules "amply satisfy the requirements of a rational basis for the classification." *Id.* at 33, 34 (citing, among other factors, that federal district courts in California rely on California's bar examination for determination of fitness to practice, that questions of California law arise often in cases within the jurisdiction of the federal district courts in California, and that the California bar is available for policing attorney misconduct). The court thus rejected petitioner's claims based on the Due Process Clause.

Turning to petitioner's claim under the Full Faith and Credit Clause, the court concluded that his

> suggestion that because he is licensed in Pennsylvania and New Jersey, the district courts in California must not only recognize that he is licensed there, but also license him here, is entirely without merit. Neither Pennsylvania nor New Jersey determined that [petitioner] is entitled to practice law in California.

Pet. App. 34. The court rejected petitioner's claim based on the right to travel, holding that "[d]enial of the right to practice law in the United States District Courts involved in this case is not a violation of any right to travel within the ambit of any federal constitutional provision." *Id.* at 35.

3. The court of appeals affirmed. Pet. App. 1-16. With respect to petitioner's challenge under the Due Process Clause, the court of appeals agreed with the district court, holding that the "considerations set out by [the federal respondents] amply satisfy the requirement of a rational basis for the classification" in the local court rules. *Id.* at 13.[4] The court also rejected petitioner's challenge

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[4] The court of appeals referred to the following considerations:

(1) the * * * district courts, having no relevant procedures of their own, rely on the California bar examination for determination of

under the Full Faith and Credit Clause, "because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that [petitioner] is entitled to practice law in California." *Ibid.*[3]

ARGUMENT

1. Petitioner asserts (Pet. 25-27) that since he has a "fundamental right" under the Due Process Clause to practice law, the court of appeals erroneously upheld the constitutionality of the challenged local rules under the less stringent "rational basis" standard of review. Petitioner is mistaken. As this Court has made plain, "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis* v. *Flynt*, 439 U.S. 438, 443 (1979). And federal courts have rejected the proposition that there

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fitness to practice law; (2) questions of California substantive law permeate the range of cases over which the district courts have subject matter jurisdiction; (3) membership in the California bar provides the district courts assurance that the character, moral integrity and fitness of prospective admittees have been approved after investigation; (4) allegations of professional misconduct can be brought to the attention of the State Bar; (5) such membership helps screen applicants who are guilty of ethical misconduct in any other jurisdiction; and (6) attorneys who are members of the California and the district court bars will not choose the forum for litigation on the basis of their membership in the federal bar rather than the clients' interests.

Pet. App. 12-13.

[3] In the court of appeals, petitioner also claimed that the local court rules violate the constitutional "right to travel" and Rule 5.1 of the Rules of this Court, and are otherwise inconsistent with the "right and justice" standard inherent in the supervisory power of the federal courts, see *Frazier* v. *Heebe*, 482 U.S. 641 (1987). The court of appeals rejected each of these claims, see Pet. App. 13 n.7, 14-16, and petitioner has not sought further review of them.

is a fundamental right—under the Due Process Clause—to practice law. *E.g., Lupert* v. *California State Bar,* 761 F.2d 1325, 1327-1328 (9th Cir.). cert. denied, 474 U.S. 916 (1985).[6] For the reasons articulated by the courts below, see Pet. App. 12-13, 33-34, the challenged local rules plainly bear a rational relationship to an attorney's fitness to practice law before the federal respondents. See *In re Roberts,* 682 F.2d 105, 108 (3d Cir. 1982).[7]

2. Petitioner also contends (Pet. 28-29) that the challenged local rules violate the Full Faith and Credit Clause. That claim is makeweight. As the court of appeals correctly pointed out, California's retesting of an attorney licensed in New Jersey and Pennsylvania does not run afoul of that constitutional provision "because no act, record or judicial proceeding, in New Jersey or Pennsylvania, states that [petitioner] is entitled to practice law in California." Pet. App. 13.

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[6] Petitioner's reliance (Pet. 25-27) on *Supreme Court* v. *Piper,* 470 U.S. 274 (1985), is off the mark. That decision involved a challenge to state bar policies under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, not the Due Process Clause. Moreover, *Piper* involved a state bar rule that discriminated against out-of-state residents. Petitioner is a resident of California.

[7] Petitioner also challenges the local rules on the ground that the Constitution prohibits the federal respondents from allowing pro hac vice admission only to attorneys who are licensed and reside in States other than California. See Pet. i, 29-30. Since petitioner did not raise that issue below, and does no more than suggest it in his petition (without elaboration and without invoking any specific clause of the Constitution), review by this Court is inappropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—282-061/20199

Supreme Court, U.S.
FILED
NOV 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-543

In The

Supreme Court of the United States

October Term, 1990

JOSEPH R. GIANNINI,
an individual,

Petitioner,

v.

MANUEL L. REAL, Chief Judge,
United States District Court for the Central
District of California, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF

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REPLY ARGUMENT

1. The respondents have not submitted any evidence, argument, or law which would undermine the conclusion the Ninth Circuit's opinion in this case is in direct conflict with this Court's holding in *Piper*. A substantial majority of this Court has squarely held an attorney's "opportunity to practice law" is a "fundamental right" protected by "Privileges and Immunities Clause". 470 U.S. 274 (1985) The Ninth Circuit's holding an out-of-state licensed attorney's opportunity to practice law in California is not fundamental – is clearly erroneous.

The Ninth Circuit also wholly disregarded the *Piper* progeny. See *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1987) (discretionary admission on motion provisions come within the ambit of the privileges and immunities clause). See *Barnard v. Thorstenn*, 109 S. Ct. 1294 (1984) (geographic isolation and inadequate resources to supervise the ethics of a nationwide bar membership is not sufficient jurisdiction for discrimination). See *Austin v. New Hampshire*, 470 U.S. 656, 660 (1975) (the norm is comity under the privileges and immunities clause). The respondents, similar to the Ninth Circuit, do not analyze the holdings of these recent U.S. Supreme Court decisions.

The cases relied upon by respondents are herein not relevant. *Lupert v. California State Bar*, 761 F.2d 1325 (8th Cir.), cert. denied, 474 U.S. 916 (1985) concerns a first year law student, and not a licensed attorney with a constitutionally protected right. *Leis v. Flynt*, 439 U.S. 438 (1979) as the Court has made clear, is limited to pro hac vice

admission. See *Supreme Court of New Hampshire v. Piper supra,* 470 U.S. at 283 fn. 16.

2. The respondents have also not submitted any explanation why petitioner has been fully denied the right to cross-examination and discovery. Or why, not one defendant has ever testified or submitted an affidavit? The Ninth Circuit's decision in this case is the product of unequivocal "home team" favoritism.

3. The respondents also do not argue this petition for writ of certiorari does not raise important questions of federal law which should be settled by this Court. See *Frazier v. Herbe,* 482 U.S. 641, 648 fn. 7 (there is a growing body of specialized federal law, a mobile federal bar, and an increased demand for specialized legal services regardless of state boundaries. See *Supreme Court of Virginia v. Friedman supra,* 487 U.S. at 71. (The Court's ruling penalizes Virginia, which has at least gone part way towards accommodating the present mobility of our population, but of course leaves untouched the rules of those states which allow no reciprocal admission or motion). See Smith, *Time for a National Practice of Law Act,* 64 A.B.A.J. 557, 558 (1978) ("It would be to the direct benefit of both the public and legal profession, under proper regulation and registration, to practice law anywhere in the United States").

4. The respondents also do not controvert petitioner's integrity or competence as an attorney. The respondents have not pointed to any facts which would rationally establish why out-of-state attorneys in California have to undergo a Judge Bork confirmation process

and satisfy the whim of his or her competitor on a shallow entry level performance test that is less reliable than flipping a coin.

5. The Solicitor General also does not explain why the Ninth Circuit employed a rational basis standard of review. This Court has recently, in a challenge to a local U.S. District Court admission rule, employed a "principles of right and justice/"rational and necessary" standard of review. Clearly, as a matter of law, there is a significant difference between a "rational" and "rational and necessary" standard of review. Approximately 40 U.S. District Courts do not find it "necessary" to deny general admission to attorneys licensed in other states. Furthermore, twenty-five states have reciprocity provisions for out-of-state attorneys, which would further vicariously qualify attorneys for general admission in many District Courts.

6. The Solicitor General also does not explain why petitioner, who has extensive experience as a federal agent, is qualified to represent a client, "vindicate federal rights" and "champion unpopular clauses", in the N. District of California, the Ninth Circuit, and the U.S. Supreme Court, and is not qualified for admission in Central District of California.

7. This Court has recognized that out of state attorneys serve an important function to our government of checks and balances. Diversity of viewpoint and freedom of speech and advocacy are restricted when a District Court limits general admission to locally licensed practitioners. This restriction on advocacy offends notions of Federalism.

Former Chief Judge Warren Burger is well known for his condemnation of the existing hodge-podge of antiquated out-of-state attorney admission rules. Respondent District Judge Tashima also has argued the challenged local district court admission rules are outdated and should be invalidated. This Court should issue a writ and consider the issues raised in this petition.

In summary, the needs of our modern society and the integrity of the federal system demands this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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